Supreme Court of the United States

In the Matter of:

ROBERT ELI STANLEY,

Appellant,

vs.

THE STATE OF GEORGIA

Appellee.

Docket No. 293

Pt. 2

Place Washington, D. C.

Date January 15, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

ROBERT ELI STANLEY,

Appellant,

vs. No. 293

THE STATE OF GEORGIA,

Appellee.

Washington, D. C.

January 15, 1969

The above-entitled matter came on for further argument at 10:10 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

WESLEY R. ASINOF, ESQ.
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Assistant District Attorney
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Fulton County Courthouse
Atlanta, Georgia 30303
Counsel for Appellee

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(The argument in the above-entitled matter was resumed at 10:10 a.m.)

MR. CHIEF JUSTICE WARREN: No. 293, Robert Eli Stanley, Appellant, versus the State of Georgia, appellee.

Mr. Sparks, you may continue with your argument.

FURTHER ARGUMENT OF J. ROBERT SPARKS, ESQ.

ON BEHALF OF THE APPELLEE

MR. SPARKS: Mr. Chief Justices and honorable Justices, at the recess yesterday afternoon I was just completing my response to questions by Justice Douglas -- excuse me -- not Douglas, Brennan -- as to the evidence of scienter. I had practically completed my summary of the circumstances which we feel justified the jury to find that this defendant knew all of the obscene nature of the matter.

I just want to elaborate in one respect.

Q Do you mean obscene in regard to the contents of the film?

A That is right, the contents of the film. He knew of the obscene nature of the film. That is the way the Georgia statute reads, I believe.

I just want to point out two things in relation to his statement, and then I will go on to something else.

In his unsworn statement he attempted to explain his possession of the films in a manner consistent with lack of knowledge of the contents. I submit that it was unreasonable

explanation, somewhat unreasonable in two respects.

First, he said that a friend brought the films, left them with him, saying he wanted the appellant to view the films. I submit that it is a somewhat unreasonable that films would have exchanged hands without some explanation on the part of the unknown friend or some query on the part of the appellant as to what as to what kind of films are they, particularly the small 8-mm. films in the can with the home-made label.

I feel quite sure that if anyone came to me and said "I've got some films I want you to see," I would say "What are they, films of your fishing trip or your family or---

Q What kind of films are they?

A They are films about girls.

Q Would you have any real clue that they were obscene films?

A I think that would warrant further inquiry.

Q That may be. But what evidence is there that there was ever any further inquiry or any further investigation as to what the films were about?

A There is no evidence, because, of course, this was an unsworn statement. The State was not allowed to cross-examine him or go into it without his consent unless he voluntarily submitted himself to cross-examination.

Q The State had the burden of proof, didn't it?

A Yes, the State had the burden of proof, your Honor. I think this is both Federal and State law, as I recall from my days as an Assistant U. S. Attorney. Where the defense goes ahead with an affirmative defense, then not the burden of proof but the burden of making a reasonable explanation shifts to the defendant.

That leads me to my next point. That is that he did not identify his friend. He neither produced him, nor did he identify him by name.

Q In that statement did he also say, "I never saw the films before today and never had shown them to anyone, so help me"?

A Yes, sir, that is true. I want to point out in that connection before I pass from this subject, in the case of Smith versus California, which this court decided, in which the defendant was convicted for the offense of mere possession of obscene matters under California ordinance, which had no element of scienter, as interpreted by the California Supreme Court.

The Court said, in an opinion by Mr. Justice Brennan: "We might observe that it has been some time since the law viewed itself as impotent to explore the actual state of a man's mind.

"I witnessed testimony of a bookseller's perusal of a book hardly be a necessary element in proving his awareness

of its contents. The circumstances may warrant the inference that he was aware of what the book contained, despite his denial."

I submit that those quoted words are pretty analogous to the facts in this case.

We are relying on the circumstances. We have no direct evidence that he knew what the films were. We submit that all of the circumstances -- the impending party, the films concealed, the title "Young Blood" -- is rather inadequate explanation---

Q How does that title suggest anything? "Young Blood," what does that suggest? Or is it my age. I don't know.

A I think it suggests, your Honor, that we normally associate sex with young people.

Q I guess it is my age.

A I want to pass on to another point.

I gathered yesterday from the questions asked my worthy adversary, Mr. Asinof, that this court has not yet viewed the contents of the films which were transmitted to this court by the direction of the Georgia Supreme Court. I wish to most respectfully and humbly urge this court to view the films before ruling on the case.

Q Do you think we ought to view the films if there are constitutional bases that don't relate to the subject matter of the films for the disposing of this case, such as the

question of mere possession or the search-and-seizure question? How do you want us to view the films?

A That was going to be my very next statement as to the legal reason why I feel that the films should be viewed.

Q Even if we think that you can dispose of this case on the possession ground of search-and-seizure, Fourth Amendment ground?

A Yes, I do, for this reason---

Q Tell me why.

A This court, or the majority of this court, has consistently held in obscenity cases from Roth on through Jacobellis, Mishkin, Ginsberg -- even Redrup, I believe -- and the last Ginsberg case in 1968 -- that obscenity is not protected by the First Amendment to the Constitution. And if the Court views these films and finds that they are not only -- that they are not borderline obscenity, but hard-core pornography---

Q If this is obscene, then we should not breach the Fourth-Amendment question?

A Should not breach the First Amendment.

Q The Fourth Amendment question, search-and-seizure.

A No, sir, but I am not saying that. As a matter of fact, I am not absolutely certain, Mr. Justice, that the search-and-seizure question is actually before this court.

Search and seizure is not an appealable question. The Court noted probable jurisdiction without restricting the question, the only appealable question, which is the constitutionality of the Georgia Obscenity Act.

The same thing happened in the Mishkin case, and the Court dismissed -- they said that the search-and-seizure question was properly briefed by both parties, but then declined to pass on it and said that probable jurisdiction had been erroneously noted as far as they were concerned.

However, I do feel that the Court would have to pass on the search-and-seizure question, but right now I am addressing myself---

Q I want to be clear on one matter with respect to your position.

A Yes.

Q Here is some allegedly obscene films. I haven't seen them, but if I should decide that this case must be reversed on the possession point or on the search-and-seizure point, Fourth Amendment points, I would not consider it -- as personally advised I would not consider it necessary to endure a sight of motion-picture films, whatever their content may be.

Do you consider that you disagree with that present thought of mind?

A I disagree with it, your Honor, so far as the First Amendment is concerned.

Q I am not talking about the First Amendment. I am talking about the two points that I am talking about, namely, the possession and the matter of seizure, which are Fourth-Amendment points.

A Your Honor, I feel that the---

Q Maybe possession is a First-Amendment point, but not in the sense that you are talking about it.

A But the Appellant is asking this court to declare a mere-possession count -- I say mere possession with scienter -- unconstitutional.

Q But if we should conclude that a statute making mere possession a criminal offense is unconstitutional under the First Amendment, regardless of the nature of the films, then it obviously wouldn't be necessary for us to see the films, would it?

A Your Honor, I take the reverse position. I say that you should see the films, and if they are hard-core pornography and outside the protection of the First Amendment, as this court has held in Roth and a whole series of cases, then it would not be necessary---

Q But assuming that I should conclude that so far as I am concerned mere possession cannot be punished as a crime, regardless of how obscene the film might be, then it would follow that there would be no point in my seeing the film. Isn't that right? I mean that seems to me to follow

as a matter of course.

Now, I know your position is that if the film is obscene, mere possession can be punished. But I say that if I disagreed with that, then obviously it would not be necessary for me to endure a showing of this film. I am not characterizing it as obscene. I don't know whether it is or not. But it probably is not one of the greatest works of art that has ever been struck by the hand of man.

A That is an understatement, your Honor.

Q I want to raise this point.

I hope you are going to address yourself to the constitutionality of this statute, mere possession without any purpose to exhibit, sell or display.

Q Yes, sir, that was going to be my next point.

To the best of my knowledge and research, and I believe---

Q As I read the record, it seems to me that the only thing established by evidence is that the picture has been displayed in Atlanta, because when it was displayed at the prosecuting attorney's office to a group of people -- is that right?

A That is the only evidence that it has been displayed in Atlanta.

They looked at it in the Appellant's home.

Yesterday, Mr. Justice, you asked me about what the

expert photographer said. He said that the films are badly scratched, that they are not in new condition at all. That is where I mistakenly said they had been extensively used. They are not in new condition at all. One reel was rolled backward and never rewound after a showing of the film. He said that obviously they had been shown before.

Q You said they had been shown in Georgia before. It doesn't say it at all. It says they were shown "someplace" before.

A That is true, sir. We didn't have any eye-witness watch this appellant show the films.

Q Wasn't the evidence that the Appellant had barely come into possession of these films that very day?

A That was not evidence, Your Honor. That was in the form of an unsworn statement.

Q You have been talking about it, though. That is the basis for much of your argument.

A Yes, sir. Under the Georgia law the jury can pay what attention it wants to it. It can either disregard it---

Q Are you suggesting that we should disregard that statement?

A I am suggesting that the Court should consider it and consider it---

Q If we do, then we know that he had barely come into possession of the films.

A I am not saying that the Court should believe it in its entirety, because the natural thing for him to have done was at least to have named him, so that the prosecution could have brought him into court.

I have only a couple of minutes left.

Q You would have arrested him, wouldn't you, because he would have admitted that he had possession of these films?

A It is entirely possible, unless he denied it. He might have said: "No, sir, I don't even know Bob Stanley. I never saw him before. And certainly I didn't give him any films." That would have made a State's witness out of him, assuming the defendant made a false statement in his unsworn statement.

On the question that Justice Harlan asked me to address myself to, on the constitutionality of the possession statute, I really see no reason why a possession statute making hard-core pornography obscene cannot be constitutionally enacted by a state. States have many possession statutes. The Court knows them as well as I do -- possession of stolen goods, possession of concealed weapons without having licenses for them, possession of narcotics, possession of dangerous drugs, possession of burglary tools.

The Federal Government has many possession statutes -- possession of a stolen car transported in interstate commerce,

possession of money taken in an FDIC bank robbery. Even during Prohibition days mere possession of intoxicating liquors of any type was an offense.

I see no reason why the possession of hard-core pornography should not be made an offense. I think this is a care of first impression before this court. I have not been able to find a case exactly in point.

Now, in the Smith case, which this court admittedly reversed because there was no scienter, it seems to me that the opinion, which I have quoted from once before, indicates or implies that had the California ordinance had the element of scienter in it that it would have been constitutional, because Mr. Justice Brennan said this:

"We most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller and the carrying of an obscene book in stock."

Q For sale by the bookseller.

A Yes, sir, but, Your Honor, the California ordinance did not have the element of carrying it in stock.

Q But it did involve a bookseller.

A It did involve a bookseller, but---

Q And having books for sale, didn't it?

A I cannot see honestly where the First-Amendment grounds hit this particular key. This man is not a bookseller.

He is suspected of being a bookmaker, but not a bookseller. He does not intend to sell these films, insofar as the available evidence indicates. The general public was not deprived of the right to look at the films.

Regardless of how the Court in distinguishing this case from the Marcus case, it said as much in its opinion. It said in the Marcus case, on the search warrant -- it said that that case involves freedom of the press and freedom of speech. This case does not. I don't think this case involves -- under the facts of this case, this is just an individual. He is not being deprived of his rights -- the public, I should say, is not being deprived of the right to view his films.

I see I have the red light.

Q That is a constitutional point, whether if you write something pornographic for your own amusement, the State can prohibit you from doing that.

A I might just say this, if I might be allowed one more sentence. I feel that a possession statute is necessary for effective law enforcement from the very type of evidentiary problem which has been pointed out by questions from this court.

You can catch the man with the pornographic material, but how are you going to prove that he has read it, that he has looked at it, or that he intends to sell it? You can stop pornography at its source.

I earnestly submit that this is the hardest type of hard-core pornography that this court has ever had before it.

MR. CHIEF JUSTICE WARREN: The next gentleman, Mr. Asinof.

ARGUMENT OF WESLEY R. ASINOF, ESQ.

ON BEHALF OF THE APPELLANT

MR. ASINOF: May it please the Court, with respect to Smith versus California, that prosecution involved a bookseller under an ordinance referring to bookselling. Consequently, the sale would deal with who was in the business of selling books.

Q But the Court has said that obscenity is not protected by the First Amendment.

A In the North North case, where that precedent was established, we find that the North case was a question of distribution. In an instance where an individual is possessing something that we admittedly will say is pornographic, the Constitution does not protect him from the distribution. And this is followed in the Redrup case.

Q But the obscenity isn't within the First Amendment.

A That is correct. But the case was dealing with the question of the distribution.

Q Do you mean that obscenity in the course of distribution is not protected but possession is protected?

A That is correct. The case did not hold that mere possession was not protected.

The Court said in Roth that obscenity was not protected, but----

Q The material does not change any; so what is the critical point? It either is or isn't protected by the First Amendment. So what is different between possession and distribution? What should you really focus on?

A In the distribution you are dealing with the question of furnishing it to others. The mere possession in the privacy of your own home, where no one else has seen it, where there is no evidence that anyone else is intended to come into contact with it -- I say that no case holds that it is not protected, that an individual cannot take a picture of his own obscenity and posterity for himself, if he so chooses, because to prohibit a person from possessing it would violate the First Amendment rights.

Q I prefer the argument that the Constitution says: "We will nip this business in the bud." What do you say about that.

A That in itself would be a violation of the First Amendment, to say that a person could not write what he wants in his own diary, for his own personal future use and not to be shown to any other person.

We say that the First Amendment is an absolute

amendment that gives a man the freedom of the press, and the freedom of the press carries with it the freedom of motion-picture films.

Q But the Court has decided -- at least the majority has decided -- that it is not an absolute right.

A But that was held in the Roth case. And the Roth case involved---

Q But you can nip it in the bud.

A Then we come to the Redrup case. This court last year in Redrup and the other cases that went with it reversed, on the Fifth and on the First Amendment, that this was not a case involving one of the three elements of distribution to minors, distribution to persons who are willing to see it, or pandering, which was held in Ginzburg.

Now, if we accept Redrup as being the law, then, of course, we must take Redrup and Roth together as they both hold and say that obscenity insofar as its mere possession and bare possession -- and I use that expression -- that bare possession would be protected by the First Amendment, because there you are not intruding upon the privacy or the rights of others to be free on this.

I would like to answer my opponent with respect to this. He says that the State Court found that the State statute did not remove the element of scienter. Now, the rule, as I understand it, is that this court will accept an

interpretation placed upon a state court as to a non-Federal ground, but as to a Federal constitutional ground this court is not precluded by virtue of a holding of a state court on the constitutional issue from reversing that state court, because this court is the one that must decide the Federal ground.

Now, secondly, in the brief of the Appellee, on page 45, he cites the case of Rainwater versus Florida, which was decided by this court during the last term. The Rainwater versus Florida case was one that originated in the State Court. There was a Federal search warrant issued under the Wage and Tax Act and seized certain items from the defendant's possession. And they prosecuted him in the State Court.

This court remanded under the theory of Grosso and Marchetti and remanded it back to the State Court for further proceedings, not inconsistent with Grosso and Marchetti.

This is identical to the case we have here.

The State says in its brief that there the prosecution in the State Court was the end result of the issuance of the Federal search warrant. That is what we have in this case. This prosecution for obscenity was the end result of the issuance of the Federal search warrant, which actually under the Rainwater versus Florida doctrine was inadmissible as having been unconstitutionally obtained.

Q To get back to this possession point, under the

State law, assuming that possession were a crime -- mere possession was a crime and not protected by the First Amendment -- could the State get out a search warrant to search your own library on the basis of an affidavit that would say that you have in that library a copy of James Joyce's ULYSSES, a copy of this book and that book? Could they get out a search warrant to examine your entire library?

A I would not think so. I think that the Constitution in the Fourth Amendment says that the warrant shall particularly describe the article to be seized.

Q In other words, they would have to name the specific book?

A That is my view of that amendment.

Now, one point that was raised by my adversary. He said that the evidence in the case indicated that one reel of film had been wound backward or was scratched and that that would indicate that someone had previously viewed that film. But it would not show, and we submit to this court, that that fact alone would not show that this defendant or this appellant had ever viewed it.

Now, in conclusion I would like to state that since my opponent has -- or my adversary -- has suggested to this court that this court view the film, he has in effect stated now that how does this court know obscene it is without viewing it. That is our very position in this case. We say

that with respect to the Appellant the same position holds true. If he has never viewed the films, he obviously would not know that they are obscene, because without viewing them you cannot learn of its obscenity.

That is the point that we have in this case. We say that since the evidence doesn't show he ever viewed the films, therefore there is no evidence that he knew or could have known that they were obscene.

Thank you.

(Whereupon, at 10:40 a.m., the hearing in the above-entitled matter was concluded.)