[Cite as *34 N. Jefferson, L.L.C. v. Liquor Control Comm.* , 2012-Ohio-3231.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

34 North Jefferson, LLC,	:	
Appellant-Appellant,	:	
		No. 11AP-868
v.	:	(C.P.C. No. 11CVF-05-5648)
Liquor Control Commission,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on July 17, 2012

Berkman, Gordon, Murray & DeVan, J. Michael Murray, and *Steven D. Shafron*, for appellant.

Michael DeWine, Attorney General, and *Paul Kulwinski*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Appellant, 34 North Jefferson, LLC, appeals from a judgment of the Franklin County Court of Common Pleas, affirming in part and reversing in part an order of appellee, Ohio Liquor Control Commission ("commission").

{¶ 2} Appellant is a permit holder of the premises known as "Masque," located at 34 North Jefferson Street, Dayton, Ohio. On January 12, 2008, agents from the investigative unit of the Ohio Department of Public Safety ("ODPS") entered appellant's establishment during business hours. Appellant was subsequently cited for improper conduct violations of disorderly conduct and public indecency.

{¶ 3} According to an ODPS investigative report, ODPS agents Michelle Thourot and Gavin Stanton, as well as Dayton Police Detective Raymond St. Clair, visited the

permit premises on January 12, 2008. The investigative report, prepared by Thourot, provided the following facts:

> At approximately 12:00 a.m., the Agents and Detective entered the aforementioned permit premises and assumed the role of patrons. The Agents walked into the first floor bar area and observed several male employees dancing on top of the bar semi nude wearing boxer briefs or a g-string completely exposing their buttocks. The Agents and Detective observed the dancers accepting tips from patrons for dances. Another dancer, later identified as James Bailey climbed up onto the bar and was completely nude only covered with a white bath towel. The Agents and Detective observed J. Bailey dancing for patrons and opening the towel completely exposing his buttocks. The Agents and Detectives observed that J. Bailey[']s penis was erect while dancing and [he] would hang the towel on his penis and dance on the bar counter. The Agents and Detective observed J. Bailey step over the Jagermeister machine located on top of the bar and opened his towel up towards the patrons and exposed his testicles. The Agents and Detectives witnessed J. Bailey move his towel around his waist and exposed his penis to patrons. The Agents and Detectives observed J. Bailey squat down in front of several patrons and observed several patrons reach underneath J. Bailey's towel and perform an act of masturbation on his penis.
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> At approximately 1:15 a.m., uniformed officers of the Dayton Police Department entered the permit premises and arrested J. Bailey for the charge of ORC: 2907.09, Public Indecency and transported him to the Dayton Police Department's jail for processing. Agent M. Thourot contacted the manager, Brian Williams and advised him of the violations. Agent M. Thourot prepared and issued Violation Notice #036692 to B. Williams for the violations of Improper Conduct - Public Indecency and Improper Conduct - Disorderly Activity.

{¶ 4} The administrative record also included a narrative prepared by Detective St. Clair, in which he set forth the following account of the events:

> After receiving complaints of illegal criminal activity, at the Masq Bar, located at 34 North Jefferson, myself and Agent Stanton and Agent Thourot, went to the Masq Bar in plain clothes working undercover to conduct surveillance at the bar.

> While conducting surveillance at the bar, we observed males who were working for the bar, dancing on the bar, and dancing semi nude. One dancer in particular, James Bailey, was dancing in the bar wearing a hat, a blue bandana on his right bicep, a white towel, and a pair of boots. While dancing on the bar for the enjoyment of the patrons, Bailey would move his towel around his body, exposing his buttocks to the patrons. At one point, I watched as Bailey, who was walking around the bar in a clockwise direction * * * had stepped over the Yeagermeister [sic] alcohol dispenser machine. When Bailey stepped over the machine, Bailey exposed his testicles to public view of the patrons inside the bar. It should be noted that the bar was very crowded and contained both male and female patrons. * * * I watched as Bailey continued to manipulate the towel around his waist exposing his buttocks. At one point, when Bailey was manipulating the towel around his waist, Bailey had opened the towel to his left side exposing his penis to public view. Again there were numerous persons inside the bar, both male and female. * * * Bailey, while dancing, would lower himself to the bar by squatting down. I would watch as the patrons would then reach up underneath his towel and begin masturbating his penis. It should be noted that Bailey's penis appeared to be semi erect or erect at certain times while dancing around the bar.

{¶ 5} Bailey was later convicted of violating R.C. 2907.40(C)(2). The commission subsequently notified appellant that a hearing would be held regarding two alleged violations of Ohio Adm.Code 4301:1-1-52(B); specifically, disorderly conduct under Ohio Adm.Code 4301:1-1-52(B)(1), and public indecency under Ohio Adm.Code 4301:1-1-52(B)(4). The matter came for hearing before the commission on April 13, 2011. Appellant entered a denial as to the two violations, but stipulated to the facts set forth in the investigator's report. Following the hearing, the commission issued an order finding that both alleged violations had occurred. The commission ordered appellant to either pay a forfeiture of $500 or serve a suspension order.

{¶ 6} On May 5, 2011, appellant filed an appeal with the trial court from the order of the commission. By decision and entry filed September 23, 2011, the trial court affirmed in part and reversed in part the order of the commission, finding that there was reliable, probative, and substantial evidence to support the commission's finding as to the charge of public indecency in violation of Ohio Adm.Code 4301:1-1-52(B)(4), but that the

commission's finding as to a violation of Ohio Adm.Code 4301:1-1-52(B)(1) was not supported by reliable, probative, and substantial evidence and was not in accordance with law.

{¶ 7} On appeal, appellant sets forth the following two assignments of error for this court's review:

> [I.] The common pleas court erred in affirming the decision of the Liquor Control Commission that Appellant violated Ohio Admin. Code 4301:1-1-52(B)(4), because the Commission's order was not supported by substantial, reliable and probative evidence establishing all of the elements of a violation of the underlying statute, R.C. §2907.09, and therefore, was not in accordance with law.
>
> [II.] The common pleas court erred in affirming the decision of the Liquor Control Commission that Appellant violated Ohio Admin. Code 4301:1-1-52(B)(4), because the statute that underlies the alleged violation, R.C. 2907.09, is unconstitutional under the First and Fourteenth Amendments on its face and as applied to an expressive dance performance.

{¶ 8} Under the first assignment of error, appellant argues that the trial court erred in affirming the order of the commission finding a violation of Ohio Adm.Code 4301:1-1-52(B)(4). Appellant maintains there was a lack of reliable, probative, and substantial evidence to support all the elements of the underlying statute, R.C. 2907.09.

{¶ 9} The applicable standards of review for both a trial court and an appellate court in reviewing an administrative appeal under R.C. 119.12 were noted by this court in *Gina, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 11AP-107, 2011-Ohio-4927, ¶ 12-13, in which we stated in relevant part:

> Under R.C. 119.12, a common pleas court, in reviewing an order of an administrative agency, must consider the entire record to determine whether reliable, probative, and substantial evidence supports the agency's order and the order is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. The common pleas court's "review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd.*

> *of Liquor Control* (1955), 164 Ohio St. 275, 280. The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but "the findings of the agency are by no means conclusive." *Conrad* at 111. The common pleas court conducts a de novo review of questions of law, exercising its independent judgment in determining whether the administrative order is "in accordance with law." *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471.
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> An appellate court's review of an administrative decision is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. The appellate court is to determine only whether the common pleas court abused its discretion. *Id.* Absent an abuse of discretion, a court of appeals may not substitute its judgment for that of an administrative agency or the common pleas court. *Pons* at 621. An appellate court, however, has plenary review of purely legal questions. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498 [2003-Ohio-418].

{¶ 10} Ohio Adm.Code 4301:1-1-52(B)(4) states in part: "[N]o permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to: [c]ommit public indecency, as said term is defined in Chapter 2907 of the Revised Code." R.C. 2907.09 defines public indecency as follows:

> (A) No person shall recklessly do any of the following, under circumstances in which the person's conduct is likely to be viewed by and affront others who are in the person's physical proximity and who are not members of the person's household:
>
> (1) Expose the person's private parts;
>
> (2) Engage in sexual conduct or masturbation;
>
> (3) Engage in conduct that to an ordinary observer would appear to be sexual conduct or masturbation.

{¶ 11} Appellant contends the trial court erred in concluding that the dance performance observed by investigative agents at the permit premises violated Ohio Adm.Code 4301:1-1-52(B)(4) because, according to appellant, the commission's order was not supported by substantial, reliable, and probative evidence establishing all of the

elements of a violation of R.C. 2907.09. More specifically, appellant asserts the evidence failed to show that anyone in Bailey's proximity who viewed the performance was likely to be affronted by the conduct. Appellant also argues there was a lack of evidence that Bailey acted recklessly in presenting the dance performance.

{¶ 12} The facts as set forth in the investigative report indicate that two agents and a detective entered the bar and observed dancers accepting tips from patrons for dances. One of the dancers, later identified as James Bailey, was "completely nude only covered with a white bath towel." The agents and detective observed Bailey "dancing for patrons and opening the towel completely exposing his buttocks." Bailey's penis "was erect while dancing," and he would "hang the towel on his penis and dance on the bar counter." At one point, Bailey stepped over a Jagermeister machine "and opened his towel up towards the patrons and exposed his testicles." Bailey then "squat down in front of several patrons," and the investigators observed "several patrons reach underneath * * * Bailey's towel and perform an act of masturbation on his penis."

{¶ 13} Appellant maintains there was no evidence that its employee, Bailey, acted recklessly, or that his conduct was likely to affront others. According to appellant, patrons of establishments such as the one owned by appellant are, by nature and definition, not likely to be affronted by nudity (i.e., the patrons of these establishments are present to observe the type of performances displayed by the dancers, including Bailey). Appellant further argues that, because Bailey was dancing for the patrons' enjoyment, there was no basis to conclude that he acted recklessly.

{¶ 14} Under Ohio law, an individual acts "recklessly" when, "with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C). Further, "[a] person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

{¶ 15} In addressing appellant's contention that there was no evidence Bailey's conduct was likely to affront others, the trial court held in part that R.C. 2907.09 does not require evidence that others actually were affronted; rather, the statute only requires that the conduct "is likely" to affront others. We agree. Further, this court has previously

noted that "[t]he issue of whether a defendant's conduct will affront others is adjudged on an objective standard." *State v. Ramey*, 10th Dist. No. 11AP-485, 2012-Ohio-1015, ¶ 19.

{¶ 16} In *Ramey*, this court cited with approval several Second Appellate District decisions involving masturbatory conduct occurring in an adult entertainment store. The defendants in those cases had argued that patrons to such establishments "would likely not be affronted by the sight of someone masturbating in a viewing booth." *Ramey* at ¶ 20. This court noted the "Second Appellate District uniformly rejected this argument," reasoning that "a patron who wished to view an adult movie would nonetheless likely be affronted by the sight of a man masturbating in a nearby booth." *Id. See, e.g., State v. Rupp*, 2d Dist. No. 21435, 2006-Ohio-6230, ¶ 28 (trier of fact could reasonably conclude that defendant's conduct of masturbating in adult entertainment establishment constituted a violation of R.C. 2907.09 as such activity would "likely affront other patrons wishing to see an adult movie"). Similarly, in the instant case, the commission could have reasonably concluded that patrons at the establishment who wished to view adult dancers would nevertheless likely be affronted by acts of masturbation. Furthermore, the evidence indicates that the bar was "very crowded" at the time, with both male and female patrons present, and the commission could have also reasonably concluded that Bailey acted recklessly with respect to those circumstances by engaging in proscribed conduct which was "likely to be viewed by and affront others" in the person's physical proximity.

{¶ 17} As noted, appellant stipulated to the facts as found in the investigative report. The trial court, upon consideration of the record, concluded there was reliable, probative, and substantial evidence to support the commission's finding of a violation under Ohio Adm.Code 4301:1-1-52(B)(4) for public indecency. Upon review, we find no error with the trial court's determination.

{¶ 18} Appellant's first assignment of error is not well-taken and is overruled.

{¶ 19} Under the second assignment of error, appellant argues that R.C. 2907.09 is unconstitutional, under the First and Fourteenth Amendments, as applied to a live performance presented in a nightclub. Appellant further contends that punishing a live performance on the basis that it is likely to offend a nearby audience member, without requiring proof that the performance is obscene, constitutes an overbroad infringement of protected expression.

{¶ 20} The United States Supreme Court has recognized that "nude dancing * * * is expressive conduct, although * * * it falls only within the outer ambit of the First Amendment's protection." *Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000). In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Supreme Court considered a public indecency statute as applied to nude dancing, and adopted the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968), in determining the constitutionality of a government rule or regulation proscribing protected expressive conduct. Under that test, a government regulation is sufficiently justified if it (1) is " 'within the constitutional power of the Government,' " (2) " 'furthers an important or substantial governmental interest,' " (3) " 'the governmental interest is unrelated to the suppression of free expression,' " and (4) " 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' " *Barnes* at 567, quoting *O'Brien* at 377.

{¶ 21} In *Barnes*, the Supreme Court considered and rejected a First Amendment challenge to an Indiana public indecency statute which prohibited nudity in public. In addressing the respondents' argument that prohibiting the performance of nude dancing was related to expression because the state was seeking to prevent its erotic message, the court held in part:

> [W]e do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers. Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the State, so long as the performers wear a scant amount of clothing. * * * The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. * * * Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

Id. at 570-71.

{¶ 22} In the instant case, appellant contends that Ohio's public indecency statute, as applied to an expressive dance performance, is a content-based prohibition on performances likely to offend the viewer. We disagree.

{¶ 23} In *Barnes*, as set forth above, the Supreme Court upheld as content neutral Indiana's public indecency statute prohibiting nudity in public places. The court in *Barnes* noted that public indecency statutes such as "[t]his and other[s] * * * were

designed to protect morals and public order," and that the statute "furthers a substantial government interest in protecting order and morality * * * unrelated to the suppression of free expression." *Id.* at 569-70.

{¶ 24} Similarly, in *Pap's,* the Supreme Court upheld a city's public indecency ordinance prohibiting nude dancing holding that "the ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments * * * and not at suppressing the erotic message conveyed by this type of nude dancing." *Id.* at 291. In that case, the Supreme Court reiterated that "[i]f the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien* for evaluating restrictions on symbolic speech." *Id.* at 289.

{¶ 25} In general, courts have recognized that Ohio Adm.Code 4301:1-1-52 ("Rule 52") is a content-neutral regulation designed to address the negative secondary effects relating to adult establishments. *See J.L. Spoons, Inc. v. Dragani,* 538 F.3d 379, 382 (2008) (holding that Rule 52, which is "almost identical" to the regulation upheld by the United States Supreme Court in *Pap's,* "is a constitutional, content-neutral regulation of undesirable secondary effects, including prostitution, drug trafficking, and assault, associated with nude dancing in an environment serving alcohol"); *Junction 615, Inc. v. Liquor Control Comm.*, 135 Ohio App.3d 33, 40 (11th Dist.1999) ("Rule 52 was not intended to suppress free speech, but was enacted to further the government's interest in public decency, sobriety, and good order in liquor establishments"). Similarly, the provisions of R.C. 2907.09 regulate certain public sexual conduct (i.e., exposing one's "private parts," engaging in "sexual conduct or masturbation," or engaging in "conduct that to an ordinary observer would appear to be sexual conduct or masturbation") as opposed to expressive conduct such as dancing.

{¶ 26} In the present case, we have little difficulty finding that the subject regulation (Ohio Adm.Code 4301:1-1-52(B)(4)) and statute (R.C. 2907.09) fall within the government's police powers and further a substantial government interest. *See 161 Dublin, Inc. v. Liquor Control Comm.*, 10th Dist. No. 01AP-134 (Dec. 27, 2001) ("Restrictions on public nudity, public decency, and erotic dancing in liquor establishments are within the constitutional power of the government"). Furthermore, as

in *Pap's*, "the ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare." *Id.* at 291. The court's observation in *Barnes* at 571, that "numerous other erotic performances" are presumably presented at such establishments without the state's interference, is instructive to the instant case; specifically, the facts indicate that, even though other dancers were performing on the date in question, Bailey was the only employee charged with public indecency. Here, because the state's interest in suppressing negative secondary effects is unrelated to the suppression of free speech, the regulation and statute are content neutral. *Pap's* at 296. Thus, we find no merit to appellant's claims that the regulation and underlying statute, pertaining to public indecency, represent a content-based prohibition on expressive performances; nor do we find that the trial court erred in concluding appellant failed to establish the regulation is unconstitutional as applied to the facts herein.

{¶ 27} Appellant also challenges Ohio's public indecency law as overbroad. Appellant, citing *Miller v. California*, 413 U.S. 15 (1973), argues that any statute that purports to prohibit live performance or expression on the basis that it is annoying or offensive is unconstitutionally overbroad.

{¶ 28} In order for a statute to be facially challenged on overbreadth grounds, " 'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.' " *161 Dublin*, quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Further, "particularly where conduct and not merely speech is involved, * * * the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973). The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council* at 800.

{¶ 29} One federal court has noted that "the Supreme Court has 'vigorously enforced the requirement that a statute's overbreadth be substantial,' * * * and cautioned that invalidation for overbreadth be deployed sparingly and 'only as a last resort.' "

Entertainment Prods., Inc. v. Shelby Cty., Tenn., 588 F.3d 372, 379 (6th Cir. 2009), citing *Broadrick* at 613. Moreover, "[o]nly if a plaintiff demonstrates 'from the text of [the statute] and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally,' is facial invalidation on overbreadth grounds appropriate." *Entertainment Prods.* at 379.

{¶ 30} In response to appellant's contention that R.C. 2907.09 is overbroad, the commission cites *New York v. Ferber,* 458 U.S. 747, 773 (1982), in which the Supreme Court upheld a statute criminalizing possession of child pornography despite a recognized concern "that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute." In *Ferber*, the court observed that "[t]he premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel." *Id*. at 771.

{¶ 31} In the present case, the commission argues that R.C. 2907.09 and Ohio Adm.Code 4301:1-1-52(B)(4) were enacted to protect against public nudity and public sex acts, and that the ability to conceive of arguably impermissible applications of the rule or statute to constitutionally protected expression does not amount to real or substantial overbreadth. We agree.

{¶ 32} As previously discussed, while nude dancing is expressive conduct, "it falls only within the outer ambit of the First Amendment's protection." *Pap's* at 289. We have also noted that the regulation at issue is content neutral, and that the issue of whether a defendant's conduct will affront others (under R.C. 2907.09) is based upon an objective standard. *Ramey* at ¶ 19. Inasmuch as R.C. 2907.09 establishes an objective measure for what constitutes public indecency, the statute has previously withstood an overbreadth challenge. *State v. Emsuer,* 12th Dist. No. CA 89-12-019 (Aug. 13, 1990) (rejecting claim that R.C. 2907.09 is overbroad; "R.C. 2907.09 does not rely upon a court's interpretation to establish an objective standard for gauging what conduct is likely to affront"). Further, this court has previously observed that "Regulation 52 is an administrative regulation which is applied in a civil proceeding, not a criminal statute," and therefore "the needed specificity commanded constitutionally in a criminal statute is not required." *WFO Corp. v. Ohio Liquor Control Comm.,* 10th Dist. No. 96APE05-558 (Oct. 31, 1996). Upon review, we are not persuaded that the rule and underlying statute are susceptible to "a

substantial number of impermissible applications." *Ferber* at 771. Accordingly, we find no merit to appellant's overbreadth challenge.

{¶ 33} Appellant's second assignment of error is without merit and is overruled.

{¶ 34} Based upon the foregoing, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.
