1967

Salt Lake City v. Peggy Allred, aka Peggy Lovejoy, aka Thelma Allred : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, a municipal corporation,
Plaintiff and Respondent,

vs.

PEGGY ALLRED, aka PEGGY LOVEJOY, aka THELMA ALLRED,
Defendant and Appellant.

Case No. 10752

BRIEF OF RESPONDENT

Appeal from a jury verdict of guilty and the sentence therefrom of the Third District Court in and for Salt Lake County the Honorable Merrill C. Faux, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE CITY, a municipal corporation,
Plaintiff and Respondent,

vs.

PEGGY ALLRED, aka PEGGY LOVEJOY, aka THELMA ALLRED,
Defendant and Appellant.

Case No. 10752

BRIEF OF RESPONDENT

STATEMENT OF THE HISTORY OF THE CASE

A complaint was signed in the City Court on February 7, 1966 charging defendant with violating subsection (8) of 32-2-1, Revised Ordinances of Salt Lake City, Utah 1965. The Defendant was convicted by a jury in the City Court on April 20, 1966 and sentenced to $299.00 and six months jail with jail confinement suspended upon payment of the fine. She filed an

appeal April 20 ,1966 to the Third District Court and was again found guilty by a jury on October 10, 1966 before the Honorable Merrill C. Faux and sentenced to six months in the County Jail and a $299.00 fine with five months of the jail sentence suspended upon payment of the fine. An appeal was filed October 17, 1966 and the matter is now before the Utah Supreme Court pursuant to Article VIII, Section 9 of the Utah Constitution.

STATEMENT OF FACTS

Defendant in her brief argues there was no one to be aided by her acts. The actual facts proved were.

Defendant, Thelma or Peggy Allred, aka Lovejoy, was charged under Salt Lake City Ordinance 32-2-1 (8) "In that said defendant, aided and abetted in the commission of a crime, to-wit: said defendant directed a Salt Lake Police Officer to a building, Room 506, Ben Albert Apartment, 130 South 5th East, Salt Lake City, to obtain sexual intercourse for hire" on February 4, 1966 at approx. 8:25 p.m.

Testimony adduced under oath was to the effect that Salt Lake police officer, Stanley Jorgensen, on January 13, 1966 (R 39) commenced to go to the El Dorado Club at 170 East 2nd South, Salt Lake City, Utah and there investigated prostitution contacts by gaining the confidence of manager Mel Jones (R 40). That the officer on January 25, 1966 observed the defendant in person (R 42) ; then on January 25, 1966

the officer let Mel Jones know of an interest in girls for $30 or $40 a night and getting exactly what you want. He was referred to the redhead sitting at the bar (Mrs. Allred) (R 49). On February 3, 1966 Mel Jones got a telephone number and called, then they waited and Jones dialed again while the officer memorized phone number 355-0529 and a conversation ensued (R 49 & 51). Later in the evening about 9:30 p.m. the phone rang and Mrs. Allred said to the officer " . . . the girl has gone home for the night and would tomorrow be all right" and gave the officer phone number 363-7373 (R 54) (unlisted numer of Peggy Allred at 130 South 5th East, Apartment 203) (R 59). Then Peggy Allred indicated she "doesn't turn a trick anymore—quit in July of 1965—all I do is make the arrangements." (R 83). On January 4, 1966 at 8:25 p.m. the Officer called 363-7373 and talked to Peggy Lovejoy, (Allred) (R 62). She advised him everything was set up at Room 506, Ben Albert Apartment for an hour for around $40 with Linda, a 24 year old brunette (R 63). The officer went directly to that address and in 506 found a known prostitute, Angie Colonge, aka Papasoakis (R 64, convicted 3-30-66), who identified herself as Linda, who let him in and locked the door (R 70). She was a 24 year old, five foot 3 inch, 120 lb. brunette (R 68). They discussed "this sort of thing" arranged by the other person for $40.00 (R 69) and a "half-and-half", meaning half phallicio and half sexual intercourse (R 71), whether the money was to be paid now or after; to all of which

she made no effort to evict the officer (R 69). That a search after arrest showed the furnished apartment contained only a sweater, whiskey, prophylactics and the prostitute. The apartment was rented and paid for by the Lovejoys—Allreds in the name of a "Elmer Radecliffe," existence questionable (R 96). Thus in aid of a bartender and prostitute, Mrs. Lovejoy directed a police officer to that room to obtain sex acts for hire.

The City ordinance and its due enactment were stipulated to by counsel and both sides rested (R 100).

The jury returned a finding of guilty as charged.

POINTS ON APPEAL

Point I

The validity of 32-2-1 revised ordinances of Salt Lake, City, Utah 1965 is not in issue as defendant is limited to the relief sought in the prayer vis: constitutionality based upon clarity.

Point II

The appeal should be dismissed as the notice is defective in that it specifies the "appeal" as based on both the facts and the law."

Point III

The ordinance is clear and unambiguous thus placing persons on notice of what acts are criminal and thus prohibited.

Point IV

32-2-1, Revised Ordinances of Salt Lake City, Utah 1965 is a valid exercise of the municipal police power in suppression of prostitution.

ARGUMENT

Point I

The Court will note at page 2 of Appellant's brief the relief sought is a ruling on the constitutionality of 32-2-1, Salt Lake City Ordinances. A constitution is that by which the powers of government are limited and to raise a "constitutional question" it must be shown that the statute will be unconstitutional in any event; hence inherently and totally invalid by reason of lack of clarity, depriving of property without due process, or otherwise infringing rights enumerated in the bill of rights of the Federal Constitution.

It would appear then, that appellant does not ask the court to rule on the other ground whereby this case might reach the Supreme Court; that is, validity. Validity is defined by words and phrases as referring to the power to enact the particular statute, and not merely to its judicial construction or application. Boehringer vs. Yarna County, 140 P. 507 (p 12 Volume 44) "Valid", is defined as meaning to "test the validity of, to make valid, confirm, good or sufficient in point of law, efficacious, *executed with the proper formalities,* . . . " citing Thompson vs. Town of Frostproof, 103 S. 118, 89 Fla. 92.

By failing to request a ruling on the power of the Salt Lake City Commission to enact the ordinance the Court can rule that appellant has narrowed the issue before the Court by default in pleading and thus consider only Point II argued by appellant.

Point II

Another procedural error on appeal is to be found in the NOTICE OF APPEAL wherein appellant asserts the "appeal is based on both the facts and the Law".

This appeal is purportedly taken, pursuant to Article VIII section 9 of the Utah Constitution:

> *"Section* 9. (*Appeals from district court — From justices' courts.*) From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below and under such regulations as may be provided by law. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the Court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the District Courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the District Courts on such appeals shall be final, except in cases involving the validity of constitutionality of a statute.

This Court has repeatedly upheld that provision by ruling that the decision of the District Court is final on the facts and the Law. Most recently in Salt Lake City v. Frank Graniere #9911 and in State v. Lyte, 75 Utah 283, 284 P 1006 and in Salt Lake City v. Perkins, 122 Utah 43, 245 P2d 1176.

Thus appellant in her notice fails to state grounds for consideration of the case by the Supreme Court and the appeal should be dismissed on procedural grounds.

Point III

Appellant argues that 32-2-1 (7-8) is so vague and ambiguous as to be unconstitutional and as authority therefor cites an 1950 polygamous prosecution ,State v. Musser, 223 P 2d 193, wherein defendant was charged under section 103-11-1 U.C.A. 1943, making it a criminal offense for two or more persons to conspire "(5) to commit any act injurious . . . to public morals . . ." In that case no language nor historic fact nor other law nor surrounding circumstance connected with the enactment, showed any intent to limit the words "public morals" to other than face meaning so the statute was held vague and uncertain under the 14th Amendment. It was claimed then that the statute failed to specify acts such as teaching polygamous doctrine so the statute was changed and prosecution renewed on the basis of an act declared to be unlawful.

We are not so unmindful of public rights of pro-

tection that we allow known criminal plans, to rob, destroy or kill, to be carried out in full before the weight of the law can be applied. Just so the city ordinance in question does not require the complainant to commit an act of adultery, fornication or prostitution before the pernicious practice of peddling human flesh can be suppressed by application of legal process. The ordinance declares the act, of agreeing or offering to commit an act of sexual intercourse for hire, unlawful and further that aiding or abetting such act by directing any person to any place for such act of sexual intercourse is also unlawful. That is what was charged and proved and the words are clear and understandable to even the most illiterate. Sexual intercourse is subject to historical, medical and practical interpretation and may be found in any dictionary. Aiding and abetting are synonomous terms defined in Webster's New Collegiate Dictionary as "To help; to further . . . one who or that which promotes or helps in something done; . . . " What could be of more help to a prostitute than to rent a room for her use and direct men to that place. What could be of more help to a bartender in providing female companionship for his customers than the facts proved and do not those acts of renting the room in a false name and using unlisted phone numbers and subterfuge in returning calls indicate a guilty mind and actual knowledge that the acts done were unlawful?

To argue that acts such as lewd, meretricious display and of moral perversion are vague, ignores the test of whether the words are defined in law, by historic fact,

or in daily usage. Lewd is defined in 76-39-5 with lascivious or obscene and exposure of person or private parts openly or in public or indecently or with any person married or not and in Webster's as "lay, ignorant, vile . . . wicked, worthless; base 2 . . . Lustful, lascivious; unchaste." All pointing to base sexual lust and clear of understanding as stated in this court in the case of Ogden City vs. McLaughlin (1888) 5 Utah 387, 16 p. 721, wherein a man and woman on a complaint before a Justice of the Peace demurred that "resorting to a house of ill fame for lewdness . . . " do not state facts constituting a public offense. In so deciding the court found the city has power to "restrain and punish . . . prostitutes". The facts charged failed to show either was a prostitute or panderer. The court said in effect the Ogden Charter § 35 gives power over prostitutes but does not embrace the offense of lewdness unless *"it be the lewdness of prostitutes"* . . . "It does not authorize the restraining of prostitution, except it be by restraining in some way the prostitutes" . . . or "keepers of bawdy and other disorderly houses § 9. Compiled Laws 697 was designed to break up houses of ill fame and punish the keepers thereof but that man and woman weren't claimed to be keepers in contradistinction to what has been alleged and proved in the instant case.

The term meretricious display is defined in Webster's is 1. Of, pertaining to, characteristic of, or being a prostitute. 2. Alluring by false show; gaudily and deceitfully ornamental. Moral perversion is defined as

"a maladjustment of the sexual life, such that satisfaction is sought in aberrant ways that is exceptional; abnormal.

In support of the proposition that the words of Salt Lake Ordinance 32-2-1 (7 & 8) are clear and unambiguous, I will cite a few more indefinite expressions which have been upheld. In re Hubbard (1964) 62 A.C. 116, 396 P2d 809, an ordinance prohibiting participation in any "game of chance" was held not void for uncertainty as a person of common and ordinary intelligence can distinguish, see also: U.S. vs. Petrillo, 332 U.S. 1. Also upheld are *"dissolute"* and *"immoral"*, People v. Deibert, 256 P 2d 355; "to make diligent effort to find the owner"; "unreasonable speed"; "unjustifiable physical pain or mental suffering"; and "to the annoyance of any other person". Lorenson v. Superior Court, 35 Cal. 2d 49, 216 P 2d 859; "satisfactory" Moyant v. Porames, 30 N.J. 528, 154 A 2d 9 (1959), "good", Brielle vs. Zeigler, 73 N.J. Super 352, 179 A 2d 789 (1962); "public peace", Bohler v. Lane, 204 F Supp 168; "obscene matter", City of Cincinnati v. Coy, 182 N E 2d 628; "necessary food", People v. Yates (1931), 298 P 961, 114 Cal. App. (Supp) 782.

Thus it is sufficient, to comply with the legislative requirement of due process of law, if the crime be set out in words well enough known to enable those persons within its reach to understand and correctly apply them. State ex rel Cox v. Bd. of Education, 21 Utah 401, 60 P. 1013.

Point IV

Section 5 Constitution of Utah provides for municipal corporations to be created by general laws on a population basis by charter:

> "Each city forming its charter under this section shall have, and is hereby granted, the authority to exercise all powers relating to municipal affairs, and to adopt and enforce within its limits, *local police,* sanitary and similar regulations not in conflict with the general law, and no enumeration of powers in this constitution or any law shall be deemed to limit or restrict the general grant of authority hereby conferred; . . . "

The power and authority of municipalities in this state to enact ordinances is derived from the legislature, S.L.C. vs. Sutter, 61 Utah 533, 216 P. 234 (see 15-8-50 UCA 1943).

The legislature has further authorized the cities to control those acts as enumerated in UCA 10-8. Some of these have already been mentioned in appellant's brief. We call the court's attention to UCA 10-8-50, which provides that the "city may punish . . . indecent or disorderly conduct, or lewd or lascivious behavior . . . and such other petty offenses as the board or commission or city council may deem proper."

The legislature obviously realizes that they cannot give explicit authorization in every field of human conduct where control would be desirable. They have therefore in UCA 10-8-50 given the city authority to

control those acts generally considered to be misdemeanors which the commission or council in their wisdom may see fit.

Appellant further contends that the city has not the power to make the act of "offering" a misdemeanor and cites cases concerning "mere agreement to commit a burglary, the mere agreement to commit larceny, the mere agreement to commit forgery, etc." We submit that there is a distinction to be drawn. One person alone can commit burglary, larceny or forgery. One person alone cannot commit the crime of prostitution or sex acts for hire, "it takes two to tango". There must be an agreement either expressed or implied between two or more individuals before the act can ever take place. If the city desires to prevent the act, then the logical place to start is to prevent the initial agreement.

If this Court finds that, contrary to appellant's brief, a sex act for hire is a crime under the City Ordinances, then under the authority of UCA 10-8-84 the City has the power to prevent that agreement which is necessary to perpetrate the crime.

A municipal ordinance is presumed valid and should be sustained when it bears a reasonable relationship to the safeguarding of public health, safety and morals . . . a city has a duty to use every legitimate means to assure public peace and tranquility, and the constitutional rights of citizens to use skating rinks on an equal basis has been held not to encompass a right to cause

a disturbance. Mister Softee v. Mayor and Council of City of Hoboken, 186 A 2d 513. This court has state in the case of Rio Grande Lumber Co. v. Dorke et al, 50 Utah 114, 167 P. 241, 242, " . . . to challenge the constitutionality of a solemn and deliberate act of legislation by the lawmaking power of a sovereign state always presents a serious question, however trifling or insignificant may be the amount involved in the particular case." In McQuillin on Municipal Corp., 3rd Edition V 1 pg. 513, the author states a legislature may create a "miniature state within its locality" and further the municipal corporation serves to assist in the government of the state § 2.09 and to promote public welfare generally by exercising powers of the state. Poulsen v. Portland, 149 U.S. 30, and U.S. v. Baltimore Railroad, 17 Wall (U.S.) 322.

When appellant says the ordinance must be construed against the city according to 1 Dillon on Municipal Corporations (5th Ed.) § 237, she fails to state that such construction is in those cases where the state law is contrary to city ordinances. That Dillon in section 239 (91) says strict construction does not apply to the "mode adopted by the municipality to carry into effect powers expressly or plainly granted . . . " where not limited or prescribed by the legislature. The usual test being reasonableness. § 238 provides "they may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted and § 239 you are to determine in favor of the state where city con-

struction is ambiguous but the first rule is the construction is to be just and give the ordinance "fair effect".

As authority for strict construction and vagueness, appellant cites City of Price v. Jaynes, 191 P2d 606. In that case Price enacted an ordinance to secure the right of persons not to be subjected to unreasonable searches and seizures which offense was held laudable but too vague. To avoid this decision the ordinance must set out the act or acts prohibited and must spell out what is under various situations an unlawful search or seizure, as 32-2-1 does. Justice Wade concurring on P. 611 said "a city may enact greater offenses (than petty) where the legislature expressly grants it such power" see Bohr v. Salt Lake, 79 Utah 121, 8 P2d 591, and American Fork v. Charliere, 43 Utah 231, 134 P 739, American Fork v. Robinson, 77 Utah 168, 292 P 249, and American Fork v. Briggs, 43 Utah 252, 134 P. 747. Appellant also cites Ogden City vs. McLaughlin et al, 188, 5 Utah 387, 16 P 721, which can be distinguished as those facts failed to show prostitution being involved as it is in the instant case. Appellant's reliance on page 12 of Salt Lake City v. Sutter (1923) 216 P. 234, fails to take cognizance of the fact that the state in that case had extensive rules on liquor and had only authorized the city to "license and regulate, or prohibit the manufacturing, selling, giving away or disposition . . . of liquors" and to "prevent intoxication, fighting, etc." That defendant was charged with knowingly having liquor in his possession (a return

to prohibition) and the court held against the city, there being a direct conflict of laws. For a contrary result see Zamata v. Browning, 51 Utah 400, 170 P 1057, wherein an ordinance prohibiting the sale of liquor was upheld as it supported the existing state law. Appellant also relies on City of Ogden v. Bear Lake & River Water Works & Irrigation Co., 52 P967. To distinguish that case the court need only note that Ogden sold its water system, which was "dedicated to a public use", to Bothwell who let interests go to Bear Lake then Ogden deeming public interest in jeopardy brought action to recover the system and have a receiver appointed. The case was remanded for trial as the charter authorized Ogden to "purchase, receive, hold, sell, lease, convey, and dispose of property, real and personal for the benefit of the City." And the court felt the city officials must protect city interests and acted beyond their authority in making a patently bad deal.

The Respondent, Salt Lake City, is asking that this court recognize a triportite division of all legislative subject matter: 1. affairs exclusively of municipal concern, 2. affairs exclusively of state concern and 3. affairs of both municipal and state concern.

Under this division where both are concerned both should have concurrent legislative power and the local regulation be held valid unless it conflicts with state law. This court has already so held in Salt Lake City v. Towne House Athletic Club and University Club, #10640, dated February 27, 1967, wherein a general

grant under UCA 10-8-39 to license and regulate was held not preempted by a later specific grant not included in the general (Also American Fork v. Charliere, supra). A line of cases in Ohio headed by City of Fremont v. Keating, 96 Ohio St. 468, 118 N E 114 (1917) upheld an ordinance identical to the state statute establishing speed limits and prohibiting municipalities from enacting them as the result did not frustrate the policy expressed by the state. The Utah policy of suppression of prostitution, bawdy houses, lewd acts, adultery and related sex acts is clear and should be given effect by recognition of ordinances drafted to carry out that expressed intention by prohibiting prositution of one's self or another to one individual. In re Hubbard (Supra 1964); the ordinance prohibited participation in any "game of chance". California has extensive gambling statutes but the ordinance was upheld because it did not operate in a field occupied by state legislation; it did not conflict with general law and was a valid exercise of a "municipal officer". The court said:

> "Since the general laws do not make illegal all forms of gambling, or even all forms of gaming they cannot be said to occupy either field to the exclusion of the exercise of local police power, unless we adopt the negative type of argument inherent in defendants contention, that is,that by making specific acts illegal the Legislature intended all other acts of similar character to be of such innocent character that no local authority might adopt a contrary view. . . . " Accord, Prival

v. Mooney (1964) 62 A.C. 126, 396 P2d 815, 41 Cal. Rptr. 399.

Inherent in this division then are the tests that a matter is the state's when 1. State laws are so comprehensive as to show an intent to preempt or, 2. They express an intent to preempt or, 3. The subject is partially covered by state law and the effect on transient citizens outweighs the possible benefits to the municipality. None of these tests would seem to apply in the instant case against Mrs. Lovejoy.

The first category in which the affair is exclusively of municipal concern can be determined from cases already decided, such as zoning. See William E. Naylor v. Salt Lake City, #10373, filed February 9, 1966, wherein this court said a city commission charging with the duty of zoning "must necessarily be allowed a wide latitude of discretion as to the manner in which they can best be attained. In conformity with well-established rules relating to the powers of administrative bodies, it is to be assumed that they have some specialized knowledge of the conditions and the needs upon which the discharge of their duties depends . . . the court will not invade the province of the commission and substitute its judgment therefore . . . " See also Village of West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N E 2d 382 (1965). Defendant was convicted of soliciting door to door contrary to ordinance. That finding was reversed, the appeal's court holding that the state statutes did not undertake affirmatively to regulate peddling but merely purported to limit the

power of municipalities to do so. They interpret general laws so that municipal autonomy is attained and a statute would not be permitted to supersede a conflicting ordianance unless the subject matter was of statewide concern. Also McElvoy v. City of Akron, 173 Ohio St. 139, 181 N E 2nd 26 (1962); Froelick v. City of Cleveland, 99 Ohio St. 376, 124 N E 212 (1919).

In another case, the City of Youngstown v. Evans, 168 N E 844 (1929), the court upheld an ordinance which prescribed penalites in excess of those permitted by a statute which purported to establish maximums. They reasoned the statute was not a "general law" because it was a limitation of municipal lawmaking rather than a "rule of conduct." If limited curbs upon local legislative authority were allowed there would be no principle by which to draw a line and invalidate an act prohibiting all municipal regulation.

CONCLUSION

If the court looks past the procedural defects of the appeal, it may establish criteria upholding ordinances where reasonable, as in this case, and thus prevent a ploy used by the defense in arguing that where no state crime is enumerated the city is without authority and where there is a state crime the state has preempted the field.

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