ALBI

IN THE COUNTY COURT IN AND FOR THE

CITY AND COUNTY OF DENVER

AND

STATE OF COLORADO

Action No. 8-29276

The CITY and COUNTY of DENVER, Plaintiff,	)	
v.	)	OPINION
SALVADORE E. ALBI, Defendant.	)	

Opinion by Judge I. Ettenberg.

17 April 1972

This matter arises out of charges filed against the defendant for alleged violation of sections 823.5-1 and 823.5-3 of the Revised Municipal Code of the City and County of Denver.

The stipulated facts show that on September 9, 1969, the defendant approached a city detective within the confines of Cheesman Park, and began talking about his camera interests. The defendant asked questions of the officer and also stated defendant's prior experiences of staying in a male whorehouse and staying with other men for payment.

The facts further show that the defendant stated that he knew a hotel where we could get a room because "we couldn't do any sex acts in a public place."

Defendant filed motions challenging the constitutionality of both sections of the ordinance, and the above facts were agreed upon between the parties. Additional evidence was taken, which evidence becomes moot upon the issues hereinafter set forth.

The trial judge, upon examination of the issues, considered the merits of the challenge to be of sufficient validity that he requested a panel of three judges to determine the issues.

Determination of the constitutional question has been delayed upon notice to both sides, pending a decision by the Federal District Court of this jurisdiction on a similar issue.

We have decided, however, that the issues posed here must be answered without further delay.

The sections in question provide:

> "823.5-1. Offenses Relating to Prostitution. It shall be unlawful for any person to:
> (a) Commit or offer or agree to commit a lewd act or an act of prostitution."
>
> "823.5-3. Be in or near any place frequented by the public, or any public place, for the

purpose of inducing, enticing, or procuring another to commit a lewd act or an act of prostitution."

The term, "Lewd Act," is defined in section 823.3, as follows:

"823.3. Definition of "Lewd Act." The term, "lewd act" shall include an appearance in a state of nudity, or in any indecent or lewd dress. The term "lewd act" shall also include indecent exposure and exposure of the private parts. A "lewd act" is an indecent, wanton, and lascivious act committed in the presence of another or in a place open to the public view."

We find that the facts do not constitute an offense within the meaning of section 823.5-1, in that they do not constitute an offer or agreement to commit a lewd act or act of prostitution.

The words, "Because we couldn't do any sex acts in a public place," may well indicate a desire on the part of the defendant, but do not constitute an "offer," or "agreement," within the prohibitions of the ordinance. That charge is therefor dismissed.

The remaining section, 823.5-3, squarely embraces the facts, and we must, therefore, meet the constitutional issue directly.

The ordinance, upon examination, contains two elements, to-wit: (1) Being in a public place, and (2) Possessing a certain state of mind.

No overt act is required in furtherance of the purpose for which the accused is present at such public place.

Thus, the thrust of the ordinance is aimed at immoral thoughts.

I have been unable to find any authority dealing with this specific issue.

The nearest analogy lies within the guarantees of the freedom of speech.

The First Amendment to the Constitution of the United

States contains this particular guarantee. It is one of our most closely guarded freedoms.

In the case of Ashton v. Kentucky, 384 U.S. 195, 200, the United States Supreme Court ruled, "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press may suffer." Also, in accord, Aptheker v. Secretary of State, 378 U.S. 500, Smith v. California, 361 U.S. 147, Bagget v. Bullet, 377 U.S. 360, and Cox v. Louisiana, 379 U.S. 536.

First Amendment rights are applied to the states through the Fourteenth Amendment, as shown by Winters v. New York, 333 U.S. 507. In short, the ordinance in question goes even beyond the strong rights secured to the people under freedom of speech.

We hold, therefor, that freedom of thought cannot be limited nor prohibited by law, and find clearly, beyond all reasonable doubt, that the ordinance, section 823.5-3, is unconstitutional on its face, as violative of the Fourteenth Amendment.

Accordingly, the charge filed under said ordinance is hereby dismissed.

Judge Leonard E. Plank and Judge William H. Burnett concurring.

I. Ettenberg

Irving Ettenberg, County Judge.

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THE CITY AND COUNTY OF DENVER,
Plaintiff,
vs.
SALVADORE E. ALBI,
Defendant.

BRIEF OF DEFENDANT IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION.

The defendant Albi is charged with the violation of the following ordinances of the City and County of Denver:

> "23.5-1. Offenses Relating to Prostitituion. It shall be unlawful for any person to:
> (a) Commit or offer or agree to commit a lewd act or an act of prostitution.
>
> "823.5-3. Be in or near any place frequented by the public, or any public place, for the purpose of inducing, enticing, or procuring another to commit a lewd act or an act of prostitution."

Pertinent to a definitive application of the foregoing sections of the ordinance is the section defining a lewd act, as follows:

> "823.3. Definition of "Lewd Act." The term "lewd act" shall include an appearance in a state of nudity, or in any indecent or lewd dress. The term "lewd act" shall also include indecent exposure and exposure of the private parts. A "lewd act" is an indecent, wanton, and lascivious act committed in the presence of another or in a place open to the public view."

In order to obtain a more clear definition of the act or acts with which the defendant is charged, the defendant filed a Motion for A Bill of Particulars and the Court ruled that the officer's notes on the back of the prosecuting attorney's copy of the Summons and Complaint would serve. The text of those notes is as follows:

> "Defendant approached the plainclothed officer (Pfanenstiel) on the South side of the pavillion in Cheeseman Park and began telling

him about his camera interests. Defendant continued to ask questions of the officer and also stated of his (defendant's) prior experience staying in a male whore house and staying with other men for payment. He stated he knew a hotel where we could get a room because we couldn't do any sex acts in a public place."

II. THE ORDINANCES UNDER WHICH DEFENDANT IS CHARGED ARE UNCONSTITUTIONAL ON THEIR FACE IN THAT THEY VIOLATE THE DEFENDANT'S RIGHTS TO DUE PROCESS UNDER THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF COLORADO.

A. DUE process is violated because the ordinances set up vague, uncertain and indefinite standards which are wholly subjective in nature and which afford men of common intelligence no guide as to what is prohibited or permissible.

There is no suggestion from the above that this defendant is being charged with offering or agreeing to commit an act of prostitution, although the breadth of the phrasing of the ordinance would permit the prosecuting attorney to do so. The inclusion of two possible alternatives in the wording is itself objectionable as being vague and indefinite. The key weakness of the two sections in question is, of course, the word "lewd". This word is subject to a limitless number of definitions, depending upon the view of the indivi complaining. Lt. McKelvy, of the Denver Vice Bureau, testified that this ordinance prohibiting "lewd" acts had been used to prosecute two women who had been kissing, and in another instance two women who had been dancing together. These prosecutinns had been initiated because in the opinion of an arresting officer, they were "lewd" acts. Could there be a better illustration of how dangerously vague and treacherously over-broad the word "lewd" is in attempting to define a standard of conduct which is considered to be a misdemeanor or an ordinance violation.

The constitutional vice of a vague or indefinite statute or ordinance is that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, the underlying principal being that no man shall be held

criminally responsible for conduct which he could not reasonably understand to be proscribed." Connally v. General Construction Co., 269 U.S. 385, 291 (1926).

In Dominguez v. Denver, 147 Colo. 233, 237, 363 P.2d 661 (1961), the Colorado Supreme Court held:

> "Indefiniteness which leaves to officer, court or jury the determination of standard in a case-by-case process invalidates legislation as being violative of due process, as contravening the mandate that an accused be advised of the nature and cause of the accusation, and as constituting an unlawful delegation of legislative power to courts or enforcement agencies. United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921)."

In the case of Smith v. Crumlish, 218 A2d 596 (1966), the Supreme Court of Pennsylvania ruled that a statute employing the terms indecent and lewd were vague. See also Commonwealth v. Blumenstein, 15 A. 2d 277 (Pa. 1959).

In People v. Bookcase, Inc., 252 NYS 2d 433 (1964), the Court held a statute which prohibited sale of pictures devoted to illicit sex or sexual immorality to be vague. "This statute . . . is so broad and so obscure in its coverage as to abridge the constitutionally protected freedom of speech as well as the due process clauses of the Federal and State Constitutions." This case approved and followed in People v. Kaplan, 252 NYS 2d 927 (1964), where a statute employing the words "lewd", "filthy", "obscene", "indecent","lascivious", and the term "provoke or arouse lust or passion" was held to be invalid as vague. The Court stated "a statute so broad in its potential sweep is too vague to meet the Constitutional requirements of the Fourteenth Amendment.

The Texas Supreme Court found the term "offensive to public decency" to be vague and further held that such vagueness was not cured by the terms "lewd" and "immoral" found in other portions of the statute. Irven v. State, 136 SW 2d 608, followed and approved in Chapa v. State, 342 SW 2d 430, 431 (1961), as was the term "public decency" in California. In re Davis, 51 Cal. Rptr. 702 (1966).

A Louisiana Court, in holding a statute vague for failing to define "indecent" stated: "It is sufficient to say that a criminal statute must define the offense so specifically or accurately that any reader having ordinary intelligence will know when or whether his conduct is on one side or the other side of the borderline between that which is not denounced as an offense against the law", State v. Kraft, 37 So. 2d 815, 816 (1948). These cases show that the use of "lewd" in the ordinance and charge in question is vague in scope and language and enforcement of such an ordinance is a flagrant violation of due process.

It should be of interest to this Court that on August 7, 1964, a three-judge Court in the City and County of Denver considered section 823.7 of the Revised Municipal Code, and found it to be so vague and indefinite as to violate due process. That section of the ordinance proscribed the possession or exhibition of a "lewd play, motion picture , lecture, demonstration, or other representation." Certainly the precedent set by that Court should be strongly persuasive and that the void for vagueness doctrine should be applied here where the defendant is merely exercising his right to communicate.

B. The Ordinance is Unconstitutional in That its Vagueness Results in Arbitrary and Selective Enforcement.

On January 12, 1970, the Colorado Supreme Court, in the case of Arnold v. Denver, Docket No. 24189, struck down a section of the vagrancy ordinance of Denver on grounds of vagueness, saying:

> "The ordinance permits varied application to the same act of a person. One officer or court might regard an individual as not giving a good account of himself while others could reach a contrary conclusion. Further, it is not sufficient explicit to advise persons of what conduct will place them in violation of the ordinance. Memorial Trusts v. Berry, 144 Colo. 448, 356 P.2d 884. The term 'giving a satisfactory account of himself' is simply too overbroad and vague to meet constitutional requirements. We declare the portion of the ordinance under consideration to be unconstitutional. Other portions of the vagrancy ordinance are not before us and no opinion as to their validity is expressed."

The application of the word "lewd" to a specific situation by an officer is as subjective as his judgment of whether or not an individual has given a "good account" of himself, and the same principal should be applied to the ordinance now challenged by this defendant.

In Goldman v. Knecht, a three-judge Federal Court in Colorado, in an opinion delivered February 3, 1969, struck down the Colorado vagrancy ordinance, on a similar basis holding,

> "In summary then, the statute is void regardless of whether it is comprehensively or specifically considered. Selection of violators will necessarily be an arbitrary process based on the personal views of the arresting officer or the philosophy of the court hearing the case. See Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965); Cox v. Louisiana, 379 U.S. 536, 579 (1965)(separate opinion of Mr. Justice Black).
>
> "In Shuttlesworth, the Court observed:
>
> > 'Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.' 382 U.S. at 90."

C. The Ordinance Violates Due Process and the Equal Protection Clause of the Fourteenth Amendment Prohibiting Discrimination between Classes of Persons.

In Goldman, the Federal District Court held that the very vagueness of the State Vagrancy Statute resulted in selective enforcement and clear violation of equal protection. It is also noteworthy that this vagrancy statute, because of its vast scope, invites arbitrary enforcement. This makes selective enforcement virtually inevitable. Certain sub-classes of individuals within the general vagrancy statutes are certain to become the targets of selective enforcement. Goldman v. Knecht, supra.

D. Section 823.5-3 of the Ordinance is Violative of Substantive Due Process in That it Presumes to Punish a Status.

This section, in fashion very similar to the vagrancy ordinances, presumes to punish an individual for being in or near a public place with a condition of mind or with a mental intent.

This is certainly a status and not a punishable act within itself. This ordinance does not punish the actual enticement or the procuring, it punishes the mere presence of the alleged offender having a certain purpose in mind. Thousands and millions of crimes are committed within the minds of human beings every day, but they are certainly not punishable under any fair system of due process. An ordinance which presumes to punish a status is clearly unconstitutional under Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417 (1962). See also the application of Robinson in the Goldman case.

III. THE ORDINANCES HERE UNDER CONSIDERATION VIOLATE THE DEFENDANT'S PREFERRED RIGHT TO FREEDOM OF SPEECH AND COMMUNICATION.

A. The Supreme Court of the United States has Propounded a Stricter Requirement of Certainty and Precision for Ordinances and Statutes Which Affect Those Freedoms Guaranteed Under the First Amendment.

The words "agree" and "offer" deal with the right of this defendant to freely speak to and converse with fellow citizens. These are freedoms clearly falling within the protections of the First Amendment.

"Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press may suffer." Ashton v. Kentucky, 384 U.S. 195, 200 (1966) in accord: Aptheker v. Secretary of State, 378 U.S. 500, 516-517 (1964), Smith v. California, 361 U.S. 147, 151 (1959), Bagget v. Bullet, 377 U.S. 360, 379 (1964), Cox v. Louisiana, 379 U.S. 536, 552 (1965).

In the leading case of Winters v. New York, the Supreme Court took cognizance of the detrimental effect statutory vagueness creates when applied to those rights protected by the First Amendment.

"It is settled that a statute so vague and indefinite; in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of

the guarantee of free speech is void on its face as contrary to the Fourteenth Amendment". (Emphasis added) 333 U.S. 507, 509 (1948).

B. The Ordinances in Question Violate the Defendant's Rights to Free Association and to Privacy.

The testimony of Lt. McKelvy indicates clearly that enforcement of these sections of the ordinance relating to solicitation of a lewd act arised when officers in plain clothes and riding in unmarked cars, circulate on the streets and in the parks of the city engaging citizens in private conversation. Further, he indicated that the vast majority of cases involving solicitation were proposals to commit acts in private. Such conduct of officers in encouraging individuals to discuss possible acts to be committed in private, is indeed a gross invasion of the private preserves of the citizen. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to notions of privacy surrounding the marriage relationship." Griswold v. Connecticut 381 U.S. 479, 14 L.Ed. 2d 510, 85 S.Ct. 1678. The ordinance before us would permit the prosecution of a husband overheard in proposing a private act to his wife. The United States District Court for the N Dis-trict of Texas in Buchanan v. Batchelor, supra,* found the State sodomy statute unconsitutional as vague and over broad insofar as it reaches the private, consentual act of married couples. It follows that there is a similar overbreadth in ordinances which presume to punish mere discussion about acts to be performed in private. The word "lewdness" at common law means open and public indecency, and in order to constitute an indictable crime, it must always amount to a common nuisance, be committed in a public place, and be seen by persons lawfully in that place. See 50 AmJur. 2d, Lewdness, Indecency, etc. Sec. 2, at page 451. These historic limitations on the definition of the expense of the power of the State to punish for lewdness, were a clear evidence of a respect for the preserves of privacy. Such decisions as Griswold and

* U.S. District Court, Northern District of Texas, decided January 21, 1970, Civil Action No. 3-3179-B.

Buchanan have clearly drawn protective circles around rights to privacy and clearly are applicable to the sections of the ordinance under attack here.

C. Both Sections of the Ordinance in This Case are Unconstitutional as an Invasion of the Defendant's Rights to Private Speech and Communication.

Both the First Amendment of the Federal Constitution and the Constitution of the State of Colorado provide that governments shall have no right to regulate the right to free speech and communication. The Courts have recognized only a few exceptions to this broad right of expression reserved to the people, those being libel and slander, and obscene utterances under certain circumstances. In earlier cases the United States Supreme Court, in defining obscenity, has placed certain limitations upon expression in written, pictures, or oral forms when such utterances were public in nature. However, in Stanley v. Georgia, 394 U.S. 557, 22 L.Ed. 2d 542, 89 S.Ct. 1243, the Court held that fewer restrictions should apply to private speech and private expression. Within the broader rule that the mere private possession of obscene materials was not a punishable crime under the First Amendment, the Court held: (1) that private speech, expression may appeal to the prurient interests, and (2) that private expression does not have to have any socially redeeming value in order to be protected under the First Amendment.

It is quite clear from the "Bill of Particulars" furnished by the City that the defendant was talking privately to only one officer, and that such conversation was not in any sense public speech or for general publication. As private speech, the fact that such expression may have appeal to the prurient interests of the listener or have been without any socially redeeming value, does not remove it from the protections of the First Amendment. At page 564 of the official report, the Court said,

> "This right to receive information and ideas, regardless of their social worth, see Winters v. New York, 333 U.S. 507, 510, 92 L.Ed. 840,

847, 68 S.Ct. 665 (1948), is fundamental to our free society. Moreover, in the context of this case - a prosecution for mere possession of printed or filmed matter in privacy of a person's own home - that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from the unwanted governmental intrusion into ones privacy. The makers of our Constitution conferred, as against the Government, the right to be left alone - the most comprehensive of rights and the right most valued by civilized man."

In this case the defendant has the right to and left the one, and to be free from the threat of prosecution in exercising his First Amendment right of private expression. The overbreadth and vagueness of the ordinances at issue in this case must necessarily fall as extending the power of the police, permitting invasions of most valued preserves of privacy. The line must be drawn short of the activities of police, as described by Lt. McKelvy, in which they encourage private conversation of citizens, assuming the guise of the ordinary person who is sympathetic and interested to listen, permit and even lead conversations into areas relating to possible sex acts in private, and then arrest the unsuspecting defendant for having exercised his clear right of private speech.

D. There Exists no Compelling, Substantial, or Reasonable Basis for These Ordinances.

Of particular relevance, is a definitive study of the California solicitation statute entitled "The Consenting Adult Homosexual and the Law: an Empirical Study of Enforcement and Administration in Las Angeles County," 13 UCLA L. Review 793 (March, 1966). The authors discuss the various social purposes to be served in the regulations of sexual activity.

Of particular relevance here is the following statement by the authors of this study in a section entitled "Conclusions and Recommendations."

> "Legislative prohibition of specific forms of sexual behavior is designed to protect three objective societal interests: 1) the right of the individual to be free from sexual coercion; 2) the right of the child to be protected from sexual exploitation;

and 3) the right of society generally to be insulated from offensive public displays of sexual behavior. A fourth interest, perhaps the driving force behind morals legislation, is the suppression of sexual behavior, which by deviating from the societal norm, is deemed to be destrictive per se of the moral fibre of society.

"Adult consensual homosexuality does not infringe all of these interests. Whether consummated publicly or privately, it involves neither sexual coercion of adults nor sexual exploitation of children. . . . This project, taking the position that the deviant nature of sexual conduct alone does not warrant the imposition of criminal sanctions, concludes that only public displays of consensual homosexuality should be the legitimate concern of the criminal law. Even then, prohibition of public homosexuality is justified, not because it involves deviant sexual behavior, but because it involves an element of public outrage."

Certainly the first three bases above justifying social control are not involved in the two ordinances under discussion here. There is no question as to sexual coercion, the protection of minors, or public outrage from any offensive open displays of sexual behavior. The only thing involved here is a private conversation. It is of unusual interest that the Stanley was decided since the publication of this report of Justice Douglas, in the Stanley opinion, rejects the fourth reason discussed above, namely the suppression of deviant sexual behavior within the realms of privacy:

"We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. . . . Whatever the power of the State to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controling a person's private thoughts. Perhaps recognizing this, Georgia asserts that exposure to obscene material may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion."

(Citing various studies made concerning any causal relationship between obscenity and lewdness and deviant sexual behavior or crimes of sexual violence.)

It should be pointed out here that the fact that a conversation occurs in a "public" place does not make it a public act or

conversation. It is not logical to make the locus the sole determinate of an act private or public in character. It is indeed irony that the convictions under solicitation ordinances and statutes are not for what the defendant did, but are for what he said as a part of a private conversation, and the only possible "public outrage" is to offend the sensibilities of a vice bureau officer vastly experienced in such matters. As the UCLA Report states:

> "Since the police decoy operates to apprehend solicitors, it is difficult to argue that he is a victim or that he is outraged by the proscribed conduct, particularly when he engages in responsive conversation or gestures with the suspect." Page 698.

It is only through the persistent use of police decoys and plainclothesmen that arrests under the solicitation ordinances are at all possible. Lt. McKelvy, in his testimony, noted that the number of such offenses was on the increase during the past year and a half. It is reasonable to conclude that the increase in the number of such arrests is due to the increased diligence of the police and the increased number of vice bureau officers assigned to such vital (?) police activity. On this point, the UCLA Report comments:

> "Yet is is questionable whether convictions should be based exclusively on the oral testimony of the arresting officer. No crime is easier to charge or harder to disprove than the sex offense. In addition to lack of corroboration, the solicitation may be equivocal or unindicative of a firm intent to consummate the solicited act. When prosecutions are limited to credibility contests between defendants and arresting officers the likelihood of miscarriages of justice is evident..." Pages 694-695.

The solicitation ordinances not only fail to perpetuate or preserve a public good, but on the contrary form the basis for a substantial public evil. It is widely known and understood that individuals are being prosecuted for such deviant conversations, and growing numbers of young hoodlums use the cloak of the protection extended by such ordinances to engage in extortion and mugging. See Wainwright Churchill, Homosexual Behavior Among Males, (New York, 1967), pages 194-195.

It is of pertinence to point out that the solicitation section retained under the Model Penal Code limits the definition of the

offense to the solicitation to commit a deviant sexual act. (This is Section 251.3) The ordinances or Denver are not so limited but cover the much broader field of the solicitation of a lewd act, whatever that may be.

IV. THE TESTIMONY OF LT. McKELVY IS MATERIAL, COMPETENT AND RELEVANT AND MAY BE TAKEN INTO ACCOUNT BY THE COURT IN DETERMINING THE CONSTITUTIONAL ISSUES RAISED BY THE DEFENDANT.

In the landmark case of Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.873, the United States Supreme Court cited extensively from school records, psychological reports and other data to make its determination of the constitutional issues raised in that case. In Stanley v. Georgia, supra, the Court cited as a part of the basis for its constitutional determination five general works and studies about obscenity and its relationship to law enforcement. Many of these works contain facts and figures concerning the methods and practices of law enforcement. It would, therefore, appear quite proper for this Court to consider, as competent and informative, the actual practices of the Denver Police Department in the enforcement of the solicitation ordinances.

Respectfully submitted,

William F. Reynard

WILLIAM F. REYNARD
Attorney for Defendant
507 American National Bank Bldg.
Denver, Colorado 80202
Telephone: 255-3618

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the within Brief to the City Attorney of the City and County of Denver, Attention Mr. Wright Morgan, City and County Bldg., Denver, Colorado 80202, by first class mail with sufficient postage thereto attached on this 29th day of July, 1970.

William F. Reynard