January 1999

Constitutional Law - Colacurcio v. City of Kent

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I. INTRODUCTION

In Colacurcio v. City of Kent, the United States Court of Appeals for the Ninth Circuit held that the City of Kent's Ordinance 3221, which required nude dancers to perform at least ten feet from patrons, did not violate the First Amendment of the United States Constitution. The court found that, as a matter of law, the Kent ordinance was content-neutral and the ten-foot distance requirement was narrowly tailored and left

1. 163 F.3d 545 (9th Cir. 1998). The appeal from the United States District Court for the Western District of Washington was argued and submitted on April 10, 1998 before Chief Judge Hug and Circuit Judges Reinhardt and Wiggins. The decision was filed on December 8, 1998. Chief Judge Hug authored the opinion. Judge Reinhardt filed a dissenting opinion.

2. "The portion of the exotic dance studio premises in which dancing and adult entertainment by an entertainer is performed shall be a stage or platform at least twenty-four (24) inches in elevation above the level of the patron seating areas." Kent City Code § 5.10.110(A). "No dancing or adult entertainment by an entertainer shall occur closer than ten (10) feet to any patron." Id., § 5.10.120(A)(3).

3. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

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open ample alternative avenues for communication of protected expression.  

II. FACTS AND PROCEDURAL HISTORY

Appellants Frank Colacurcio, David Ebert, and Steve Fuston desired to open a non-alcohol serving adult nightclub in the City of Kent, Washington, featuring nude dancing on stage and personalized table dances. The appellants claimed that the ten-foot rule would effectively eliminate table dancing which, unlike nude dancing performed on a stage, requires dancers to be in close proximity to the patrons. Thus, the appellants contended that the City's ordinance violated the United States Constitution for it amounted to a complete ban on table dancing which is a unique form of expression entitled to separate First Amendment analysis. They then filed suit in the United States District Court for the Western District of Washington seeking declaratory relief and damages.

In response, the City of Kent filed a motion for summary judgment. In granting summary judgment, the district court ruled that (1) the ordinance was a content-neutral time, place, and manner regulation; and (2) the ten-foot distance requirement was narrowly tailored and left open ample alternative avenues for communication of protected artistic expression. The appellants appealed to the Ninth Circuit.

4. See Colacurcio v. City of Kent, 163 F.3d 545, 557 (9th Cir. 1998).
5. See id. at 548. The Kent City Council had examined the issues related to adult entertainment for many years and, in 1995, adopted Adult Entertainment Ordinance 3214. See id. at 548. In 1996 it amended Ordinance 3214 by adding Ordinance 3221. Shortly thereafter, appellants filed their suit. See id. at 549.
6. See Colacurcio, 163 F.3d. at 549.
7. See id. at 548. In addition, appellants argue that table dancing is the primary source of income for exotic dancers and the Kent ordinance would make it uneconomical and therefore impossible for exotic dance studios to open or operate. This would deprive dancers of their employment opportunity. See id. at 549.
8. See id. at 549.
9. See Colacurcio, 163 F.3d at 549. The United States District Court for the Western District of Washington, Judge Thomas S. Zilly, granted summary judgment in November of 1996. See id. at 548.
10. See id. at 549.
III. THE COURT'S ANALYSIS

A. THE MAJORITY OPINION

Chief Judge Hug, writing for the majority, began by analyzing the level of protection traditionally reserved for nude dancing. According to Chief Judge Hug, the fragmented nature of the United States Supreme Court opinions dealing with nude dancing in particular and sexually explicit but non-obscene conduct in general, resulted in a lack of clear guidance on the level of First Amendment protection afforded to this type of expression. Likewise, scholars such as Lawrence Tribe and Erwin Chemerinsky had grappled with the problem of the uncertain status of nude dancing and adult entertainment under the First Amendment.

The Ninth Circuit focused on the appellants' contention that the district court erred in determining that the Kent ordinance was content-neutral as a matter of law. In accordance with the United States Supreme Court opinion in Ward v. Rock Against Racism, the Ninth Circuit concluded that municipalities may impose reasonable restrictions on the time, place, and manner of protected speech provided that the restrictions are: (1) content-neutral; (2) narrowly tailored to serve significant

11. See id. at 550.
12. See LAWRENCE TRIIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-18, p. 938 (2d ed. 1988). Professor Tribe noted that "no court has yet squarely held that sexually explicit but non-obscene speech enjoys less than full First Amendment protection." See also Colacurcio, 163 F.3d at 550.
13. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 11.3.4.4. p. 836-41 (1st ed. 1997). Professor Chemerinsky views Supreme Court precedent as accordin sexually explicit expression "low value" status. See also Colacurcio, 163 F.3d at 550.
14. See Colacurcio, 163 F.3d at 550. Appellants argued that the ordinance was content-based on its face and that the record showed that the city's predominant intent in passing the ordinance was to ban all adult entertainment in Kent. See id. This contention was based on statements made by the mayor and other city officials, in addition to the City's alleged pattern of adopting restrictive ordinances in response to proposals to build exotic dance studios. See id. at 551.
governmental interests; and (3) leave open ample alternative channels of communication.\footnote{16} 

The court acknowledged that the ordinance would meet the content-neutral requirement if it was aimed at controlling the secondary effects of the banned activity or of the protected expression.\footnote{17} In addition, the Court disagreed with the appellants' claim that the purpose of the ordinance was to suppress speech.\footnote{18} The court concluded that because the ordinance was aimed at controlling prostitution, drug dealing, and other criminal activity, the Kent ordinance was justified without reference to speech suppression.\footnote{19} 

The appellants also contended that the ten-foot distance requirement was not narrowly tailored because the City could have used less restrictive means to achieve the same result.\footnote{20} The court disagreed, however, finding that the appellants failed to present evidence that showed that the ten-foot rule substantially burdened more expression than necessary to achieve its purposes.\footnote{21} 

\footnote{16} See Colacurcio, 163 F.3d at 551 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). 

\footnote{17} See id. at 551. Such secondary effects include threats to public health and safety resulting from the protected expression as opposed to the protected expression itself. See id. at 551. Contrary to appellants' contention, the court found that the Kent ordinance was not content-based on its face because the ordinance did not distinguish between table dancing and other exotic dance forms, nor did the ten-foot distance requirement apply solely to table dancing. See id. at 552. 

\footnote{18} See Colacurcio, 163 F.3d at 552. Appellants cited various statements made by city officials and others allegedly revealing the City's underlying speech-suppressive purposes. For example, appellants quote the following statement from the Planning Committee Chairman: "With all the regulations we have adopted, I'm not too concerned that someone's going to come and try to open something up. Because we've made it a little bit difficult for them to make money in the traditional way they make money." Id. at 552. The court disagreed and noted that the ordinance was based on a comprehensive study of adult entertainment businesses and their secondary impacts. See id. at 553. 

\footnote{19} See id. at 553. 

\footnote{20} See id. at 553. 

\footnote{21} See Colacurcio, 163 F.3d at 554 (quoting Ward, 491 U.S. at 798-799). Chief Judge Hug explained that a regulation of time, place, or manner must be narrowly tailored to serve the government's legitimate content-neutral interests, but it need not be the least restrictive means of doing so. See id. at 554. Chief Judge Hug continued: "Rather, the requirement of narrow tailoring is satisfied 'so long as the ... regulation
The court next addressed the appellants’ argument that the Kent ordinance failed to leave open ample alternative channels of communication. The Ninth Circuit acknowledged that what made this case unusual was the appellants’ claim that table dancing was a unique form of protected expression that was qualitatively different from nude stage dancing thereby entitling it to a separate First Amendment analysis. The court held that even if table dancing was a unique form of expression, case precedent indicated that uniqueness alone was insufficient to trigger separate First Amendment protection. Further, the Ninth Circuit found the appellants’ alternative avenues of communication argument flawed because governmental interests protected by the enactment must also be taken into account. The Court concluded that table dancing in private nightclubs, an activity with documented links to prostitution and drug dealing, was a highly unlikely candidate for special protection under the First Amendment.

Next, the court addressed the appellants’ argument that the applicable “forum” for a table dance was not the whole cabaret, but merely the area required for performing the table dance. The court disagreed with the appellants’ attempt to extend the public forum principle to private nightclubs.
Lastly, the court rejected the appellants' economic argument that the income from table dances was the dancers main source of income. Unconvinced by this argument, the Court stated that “the fact that appellants hire their dancers on an independent contractor basis, refuse to pay their dancers for dancing on stage, require their dancers to pay rental fees, and limit their dancers' remuneration to tips from patrons, appears to us to be an effort to maximize profits while minimizing dancers' economic security.” Therefore, this argument failed because the appellants did not produce economic evidence sufficient to show that the ten-foot distance rule would result in an absolute bar to market entry. The appellants merely established a potential loss in profits, which arguably could be remedied by restructuring the way in which they conducted business.

B. THE DISSenting OPINION

In the dissenting opinion, Circuit Judge Reinhardt stated that the district court erred in granting summary judgment in favor of the City of Kent. Judge Reinhardt articulated a more narrow issue as to whether table dancing constituted a separate form of expressive communication that differentiated it from other types of nude dancing. According to Judge Reinhardt, the appellants presented sufficient evidence to establish a triable issue of fact so as to survive the City's summary judgment motion.

correct in rejecting this proposition. If forum analysis is relevant here, the appropriate forum is the entire cabaret.

Id.

29. See Colacurcio, 163 F.3d at 556-557. Appellants alleged that income from table dances is the main source of revenue for appellants' entertainers who are not compensated for stage dances because the dancers in appellants' establishments are independent contractors who pay rental fees to the dance studios. See id. at 556-557. These fees are the appellants' primary source of revenue. See id. at 557.
30. Colacurcio, 163 F.3d at 557.
31. See id.
32. See id. at 558. (Reinhardt, J., dissenting).
33. See id. at 558. Judge Reinhardt also stated that whether the message being communicated by a table dancer was different in content from that communicated by a nude stage dancer was an important factor for analysis. See id. at 558.
34. See Colacurcio, 163 F.3d at 558. The appellants introduced the testimony of cultural anthropologist Judith Hanna and University of California, Santa Barbara
IV. IMPLICATIONS OF DECISION

This case illustrates the Ninth Circuit’s lack of clear, constitutional guidelines regarding the level of First Amendment protection afforded controversial activities such as nude dancing. As Chief Judge Hug noted, nude dancing is a form of expressive conduct protected, to some degree, by the First Amendment. However, the court addressed the area of personalized table dancing, a socially unpopular form of expression, quite cautiously. Although this type of expression in general falls within the parameters of the First Amendment, the Ninth Circuit was nonetheless hesitant to render a decision that would more clearly define the type of expressive activity entitled to First Amendment protection.

In addition, the Ninth Circuit affirmed the United States District Court’s grant of summary judgment as a matter of law. In so doing, the Ninth Circuit acknowledged that while nude dancing does enjoy some First Amendment protection, it is far easier to define what forms are not protected than to clarify what is covered.

Communications Department Chair Edward Donnerstein. Both Hanna and Donnerstein contrasted the message sent by physical closeness with that sent by the distance imposed by stage dancing which, Hanna testified, transmits an entirely different signal: “coldness and impersonality.” See id. at 559. According to Judge Reinhardt:

Appellants, by producing these declarations (testimony of Judith Hanna and Edward Donnerstein) have created a material question of fact regarding whether table dancing is, as the district court and the majority conclude, merely stage dancing at a ‘louder volume,’ or whether it is an altogether different form of expression that depends upon proximity, and communicates a different and particular content.

Id. Judge Reinhardt would have reversed summary judgment because he believed the factual issues created by the appellants’ expert testimony raised questions for a jury. See id. at 559.

35. See Colacurcio, 163 F.3d at 549-550.
36. This approach is similar in content to the view expressed by Justice Potter Stewart in his concurring opinion in Jacobellis v. Ohio, 378 U.S. 184, 197 (1963). Justice Stewart, in concluding that criminal obscenity laws were constitutionally limited under the First and Fourteenth Amendments to hard-core pornography, stated:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description (hard-core pornography); and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Jacobellis, 378 U.S. at 197.
Despite a lack of established guidelines, the Ninth Circuit's holding is consistent with other appellate court decisions on the constitutionality of municipally imposed distance requirements between nude dancers and patrons. The United States Court of Appeals for the Sixth Circuit encountered a similar issue when the validity of a Chattanooga, Tennessee ordinance requiring a six-foot buffer zone between nude dancers and patrons was challenged. While the Sixth Circuit analyzed the buffer zone issue differently than the Ninth Circuit, it nonetheless arrived at a similar conclusion: a municipally imposed distance requirement between nude dancers and patrons is constitutional so long as it furthers sufficient governmental objectives such as the prevention of prostitution, drug dealing, and disease.

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37. See DLS, Inc. v. City of Chattanooga, 107 F.3d 403 (6th Cir. 1997). In DLS, owners and employees of an adult cabaret challenged a city ordinance that regulated adult-oriented establishments. Although the DLS court addressed a variety of issues, a large portion of the opinion concerned the constitutionality of Chattanooga City Code § 11-435(d). See id. at 406. This statute required all performances to occur at least six feet from the nearest entertainer, employee, and/or customer. See id. The Sixth Circuit held that the ordinance provision prohibiting performers from approaching within six feet of customers did not violate the First Amendment. See id. at 413.

38. See DLS, 107 F.3d at 409. The Sixth Circuit recognized that erotic dancing is not necessarily "expressive activity," as a matter of law, for First Amendment purposes. Rather, the message communicated by nude dancing was "an endorsement of erotic experience" as opposed to speech. See id. at 409. In this regard, DLS differed from Colacurcio, where appellants provided evidence to qualify nude table dancing as an expressive form of communication because of it's message.

39. See DLS, 107 F.3d at 410. The Sixth Circuit held that appellants were incorrect in claiming that the six-foot distance rule failed to further governmental interests. The Sixth Circuit found that the requirement of a six-foot buffer zone furthered the important state interests of the prevention of crime and the prevention of disease. See id. at 410-411.

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