

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED

OCT 20 1998

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY _____ DEPUTY

STATE OF OKLAHOMA, ex rel.)
ROBERT H. MACY,)
)
Plaintiff,)
)
vs.)
)
BLOCKBUSTER VIDEOS, INC.,)
HOLLYWOOD VIDEO, INC., and)
OKLAHOMA METROPOLITAN)
LIBRARY SYSTEM,)
)
Defendants.)

NO. CIV-97-1281-T

DOCKETED

ORDER

Summary of Ruling

The issue addressed in this order is whether the motion picture, "The Tin Drum," may be subjected to the criminal penalties of Oklahoma's child pornography statute.

"The Tin Drum," an Academy Award and Cannes International Film Festival prize winning film, has been in public circulation throughout the world for 20 years without ever before having been subjected to any known governmental sanctions or censorship. The film, a German language film based on a critically acclaimed novel by Gunter Grass, has a dominant non-sexual theme and has undisputed artistic merit. It is described as a complex allegorical fantasy about the rise of Nazism, as shown from the point of view of a young boy. At issue are three scenes comprising approximately two minutes of the two hour and twenty-two minute film. The scenes are not sexually explicit, are without actual nudity and no actual sexual conduct occurred. However, the scenes portray minors in activities which are clearly suggestive of or can be interpreted as sexual.

Oklahoma law prohibits material in which minors engage in explicit sexual activity, as well as those in which they are portrayed as engaging in sexual conduct. The law excepts, however, material which (1) does not have as its dominant theme an appeal to prurient interest and (2) is a bona fide work of art, i.e., has serious literary, artistic, educational or scientific value. Such issues are to be decided by the courts on a case by case basis.

While the state has every right and duty to prohibit and criminalize such a profound evil as child pornography, under the facts and law presented here, the court concludes that the film in issue is not one that violates the law as claimed.

Order

In this action, plaintiff seeks a declaratory judgment that the motion picture, "The Tin Drum," contains material which violates Okla. Stat. tit. 21 §1021.2, Oklahoma's statute prohibiting child pornography. Plaintiff has filed a motion for summary judgment in which he argues that the motion picture contains scenes in which minors are involved in actions suggestive of sexual contact, as prohibited by the statute, and one scene in which a minor is depicted as observing a sexual encounter between an adult and another minor. Defendants Blockbuster Videos, Inc. and Southwest Video, Inc. have filed a joint motion for summary judgment in which they argue that, because the motion picture is a serious bona fide work of art and its dominant theme is not an appeal to prurient interest, it does not violate the statute. Plaintiff argues that the statutory exception for bona fide works of art is not applicable to child pornography, and applies only to the statutory prohibition against obscenity.

The question thus presented by the parties' cross-motions is whether "The Tin Drum" is subject to the criminal penalties imposed by Oklahoma's child pornography law. The parties agree that, having viewed "The Tin Drum," the court can determine whether its contents violate Oklahoma's child pornography statute as a matter of law.¹ Because the two motions address identical legal issues, both are addressed in this order.

"The Tin Drum," a German language film with English subtitles, received the 1979 Academy

¹*Summary judgment may be granted where there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The mere existence of a factual dispute will not defeat a motion for summary judgment; rather, the factual dispute must be genuine and material to the issues presented. Anderson v. Liberty Lobby, 477 U.S. 242, 247-48 (1986). A material fact is one which may affect the outcome of the suit under the governing law, and such facts are genuinely disputed only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id.*

Award for best foreign language film, and shared the Palme D'or Award at the Cannes International Film Festival that year. The film has been the subject of critical acclaim, and has been discussed in numerous academic articles and books related to film studies. *See, e.g.*, defendants' exhibits 11, 12. Commentators have extensively referred to the film's complex imagery and symbolism. *Id.* Although "The Tin Drum" has been in public circulation throughout the world for nearly 20 years, there is no evidence that it has ever before been subjected to governmental sanctions or censorship.

Based on the 1959 novel of the same name by Gunter Grass, the film is described as a complex allegorical fantasy intended to symbolize the rise of Nazism and the corresponding decline of morality in Nazi Germany. *See, e.g.* defendants' exhibits 12, 13. The main character in the film, who is also its narrator, is Oskar Matzerath. Oskar is depicted as deciding, at the age of three, to stop growing physically. His motive in doing so is described as "a protest against the absurdities and obscenities of the adult world" during the rise of Nazism. See Defendants' Exhibit 14. Told from Oskar's point of view, the film opens in the 1930's in Danzig, and concludes at the end of World War II. Throughout the approximately 18 years depicted in the motion picture, Oskar remains diminutive in size and appears to be a very young child, while those around him age normally. At the end of the film and near the end of the war, when he is 21 years old, Oskar indicates his intent to begin growing again.

Plaintiff contends that the film contains three scenes in which minors are represented as engaging in sexual activity, that such representations constitute child pornography under the Oklahoma statute, and that those who knowingly sell, distribute or possess the film may thus be prosecuted according to the statute. The statute, entitled "Minors—Obscene or indecent writings, pictures, etc.," provides in pertinent part:

Any person who shall procure...any minor under the age of eighteen (18) years in any film, motion picture,...or any type of obscene material wherein the minor is engaged in or portrayed, depicted, or represented as engaging in any act of sexual intercourse...or other sexual activity...or who knowingly possesses, procures, or manufactures, or causes to be sold or distributed any obscene material involving the participation of any minor under the age of eighteen (18) shall be guilty, upon conviction, of a felony...

The scenes at issue are referred to by the parties as 1) the bedroom scene, 2) the bathhouse scene, and 3) the sitting room scene. It is not disputed that the three scenes comprise a total of approximately two minutes of the two hour and twenty-two minute film. It is also not disputed that the actor and actress are represented as being 16 years old in the scenes at issue².

In the bedroom and bathhouse scenes, the actor and actress are portrayed in positions or activities clearly suggestive of a sexual act. In the sitting room scene, the actor appears to be observing the actress and another in sexual activity.

It is not disputed that these scenes do not contain graphic sexual activity and that the actors did not engage in actual sexual activity or contact with the genitals or genital area during any of these scenes; it is also not disputed that neither total nor frontal nudity nor the display of the genital area appears in any of the scenes³. The absence of such graphic or explicit activity does not, however,

²David Bennent, who portrays Oskar, was 11 years old when the film was produced; the actress in the scenes was 24 years old at the time; both are portrayed as 16 years old in the scenes at issue in the film. See Bennent affidavit, defendants' exhibit 3; Katherina Thalbach affidavit, defendants' exhibit 4.

³See Bennent affidavit, defendants' exhibit 3; Thalbach affidavit, defendants' exhibit 4. In the bathhouse scene, the camera angle shows the actress' bare back and partially shows her buttocks; however, her body was covered with an opaque fabric during the filming of the scene, and the minor actor did not see or have physical contact with her pelvic area. Schlondorff affidavit, defendants' exhibit 2, p. 6; Bennent affidavit, defendants' exhibit 3, p. 4; Thalbach affidavit, defendants' exhibit 4, p. 3. Bennent was not present during the filming of the sitting room scene and did not observe the conduct at issue. Bennent affidavit, defendants' exhibit 3, p. 5. The scene was filmed in two segments, and the suggestion of his observation was

necessarily mean the statute does not apply because it also prohibits material in which minors are “portrayed, depicted, or represented as engaging in” sexual conduct. Notwithstanding the absence of graphic sexual portrayals and the use of artistic film techniques, it cannot be disputed that each of the scenes can be interpreted by a viewer as suggesting some type of sexual conduct. Because the three scenes involve actors who are or appear to be minors, the scenes thus encompass the conduct included in the express language of §1021.2.

Defendants argue that, even if the scenes are interpreted as “representing” sexual conduct by minors, the film is not subject to Oklahoma’s child pornography sanctions because an appeal to prurient interest is not its dominant theme and it has artistic value. Accordingly, defendants contend, the film qualifies for the statutory exception applicable to bona fide works of art. That exception is set out in § 1021.1 which provides:

This act shall not apply to persons who may possess or distribute obscene matter or participate in conduct otherwise prescribed by this act, when such possession, distribution, or conduct occurs in the course of law enforcement activities, or in the course of bona fide scientific education or comprehensive research or study, or bona fide objects of art or artistic pursuits, or like circumstances or justification, where the possession, distribution or conduct is not related to the subject matter’s appeal to prurient interest.

(Emphasis added). Plaintiff contends that § 1021.1 does not apply to the child pornography prohibitions in § 1021.2, and that the phrase, “This act,” refers only to the obscenity prohibitions set out in § 1021. Plaintiff thus contends that the exclusion of bona fide works of art not having an appeal to prurient interest is inapplicable to material otherwise prohibited by § 1021.2 and that any

accomplished by the placement of the camera in the doorway during the first segment. Schlondorff affidavit, defendants’ exhibit 2, p. 9. The portion of the scene in which he appears was filmed separately. Id.

material which may appear to involve minors engaged in sexual conduct is subject to criminal penalties, without exception.

The parties agree that the Supreme Court has held that, to satisfy the First Amendment, serious literary and artistic works must be excluded from statutes prohibiting material that would otherwise satisfy the definition of obscenity; accordingly, statutory obscenity prohibitions must be limited “to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” Miller v. California, 413 U.S. 15, 24 (1973). This standard, known as the Miller test, has been widely adopted by the states in their efforts to regulate obscenity. New York v. Ferber, 458 U.S. 747, 755 n. 7 (1982). As plaintiff points out, however, Ferber holds that the “States are entitled to greater leeway in the regulation of pornographic depictions of children.” 458 U.S. at 756. Under Ferber, the Miller test need not be applied to child pornography; therefore, a court or legislature may restrict child pornography without considering whether it appeals to prurient interest or whether it has literary or artistic value. Id.

Plaintiff argues that § 1021.1 essentially incorporates the Miller test and, because the Miller test need not govern child pornography statutes, it should not apply to § 1021.2.⁴ Plaintiff also argues that, in any event, the phrase, “This act” in § 1021.1 applies only to the obscenity prohibitions in § 1021 and not to § 1021.2, the child pornography provision.

Defendants argue that plaintiff’s interpretation is contrary to the rules of statutory construction. Because the Oklahoma statutes regulating obscenity and pornography have consistently

⁴As defendants point out, § 1021.1 was enacted in 1967, and Miller was not decided until 1973.

been treated as a single integrated statutory scheme and contain related provisions which cannot be applied independently, defendants argue, the bona fide works of art exception must be applied to all provisions, including the child pornography statute. Alternatively, defendants contend that, without the limitations of the statutory exception, the child pornography statute violates the First Amendment as applied to “The Tin Drum.”

When interpreting statutes, the court must first look to the language of the statute; where that language is clear and unambiguous, the plain language governs. *See, e.g. ABC Rentals of San Antonio, Inc. v. C.I.R.*, 97 F.3d 392, 398 (10th Cir. 1996); Okla. Stat. tit. 25 § 1. The various portions of legislative enactments on a single subject are to be construed together and given effect as a whole. *Ashby v. Harris*, 918 P.2d 744, 748 (Okla. 1996).

The statutory provisions at issue in this case are a part of a legislative enactment restricting obscenity and pornography, and are contained in §§ 1021 through 1024.4 of Title 21. They are included in a series of statutes labeled as Chapter 39 and collectively entitled, “Indecent Exposure, Obscenity, and Disorderly houses.” This legislative enactment has been included in the statutes since 1910, and has been amended numerous times. However, both the language of the various provisions and the legislature’s subsequent amendments evidence the treatment of these provisions as an interrelated statutory scheme to combat obscenity and pornography. In fact, in 1984 the legislature amended the definition section of the statute, § 1024.1, to replace the phrase “as used in this act” with “[a]s used in Sections 1021 through 1024.4 of this title,” thus clarifying the intended meaning of the phrase, “this act.” Moreover, seven sections (including the child pornography provision) utilize the phrase, “obscene material,” without defining it; instead, one section contains definitions applicable to all provisions. *See* § 1024.1.

According to the rules governing statutory construction, the separate statutory provisions designed to prohibit obscenity and child pornography must be construed together and given effect as a whole. Ashby, 918 P.2d at 748. The court concludes that plaintiff's suggested construction must be rejected and that the term "this act" as set out in § 1021.1 must be interpreted to refer to all provisions, including the child pornography prohibition at § 1021.2. Therefore, the exception for material constituting a bona fide work of art and not having an appeal to prurient interest applies to the prohibitions against child pornography.

This construction is not prohibited by Ferber. Although Ferber allows greater restrictions on child pornography than those applicable to obscenity, it does not require such restrictions. Neither does it require the states to eliminate considerations of the material's dominant theme or artistic, literary or educational value when evaluating material in which minors are portrayed as engaged in conduct that may be interpreted as sexual.⁵ The New York statute at issue in Ferber was directed at the "hard core of child pornography." 458 U.S. at 773. It contained no exceptions for works having literary or artistic merit. The legislative history of the New York statute and federal child pornography laws reflects that such laws are directed at "those who seek to profit through a commercial network based upon exploitation of children" by using them as the subjects of graphic sexual activity⁶. Ferber, 458 U.S. at 756. Thus, the Ferber videotapes showing actual sexual activity

⁵*In a subsequent decision, the court upheld an Ohio child pornography statute outlawing the possession of nude photographs of minors in certain circumstances. Osborn v. Ohio, 495 U.S. 103 (1989). The Ohio statute was subject to exceptions, including *inter alia*, material presented for a "bona fide artistic, medical, scientific, educational ... or other proper purpose." 495 U.S. at 114, n.9.*

⁶*The legislative history also emphasizes the harm resulting to children who are filmed engaging in explicit sexual activity. 458 U.S. at 759-60; see also 458 U.S. at 760, n 10. The evidence in this case reflects that the risk of such harm is not present in "The Tin Drum"*

as the only theme and having no claimed literary or artistic value were exactly the type of material which child pornography laws are designed to prohibit. 458 U.S. at 774.

However, the Ferber court noted that such statutes must be applied on a case-by-case basis with a proper concern also to avoid suppressing serious literary or artistic expression. Ferber, 458 U.S. at 756. Thus, the court “should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.” *Id.* at 769 n. 24. Applying Oklahoma’s statutory exception for material not having a dominant theme of appeal to prurient interest and having serious artistic, literary, educational or scientific merit is consistent with that instruction. Furthermore, applying the exception on a case-by-case basis will not prevent the state from its laudable goal of criminalizing hard-core child pornography which lacks these merits.

That a case-by-case approach is proper is illustrated by contrasting the facts in Ferber with “The Tin Drum.” The defendant in Ferber was the proprietor of a “bookstore specializing in sexually oriented products.” 458 U.S. at 751-52. Defendants here are the Oklahoma Metropolitan Library System and two video stores not specializing in adult or sexually oriented material. The Ferber material was not a motion picture produced for distribution in theaters, but consisted of video tapes displaying young boys engaged in overt sexual activities. Such activities were the only theme of the videotapes. 458 U.S. at 747. There was, in fact, no claim that the videotapes at issue in Ferber had any artistic merit. 458 U.S. at 774, n. 28.

To reiterate for the purpose of this contrast, “The Tin Drum” is a professionally produced award winning feature film based on an acclaimed novel; its director and the actors have extensive

because the minor actor was not required to perform or observe graphic sexual acts or to expose himself. Bennet affidavit, defendants’ exhibit 3.

professional credentials in both film and theater. In addition to its international theatrical distribution for nearly 20 years, the film has been shown on television in the United States and abroad and has been available for sale and rental on videotape for years, all without censorship. The three scenes at issue in "The Tin Drum" comprise approximately two minutes of the two hour and twenty-two minute film devoted primarily to non-sexual material. Furthermore, the suggestion of sexual conduct between minors or between adults is not only not the predominant theme of "The Tin Drum," it is insignificant to the overall theme. While many viewers may find the three scenes at issue objectionable and while they are inappropriate for young viewers, the theme of the film, taken as a whole, is not sexual. The film clearly warrants the protections of its "R" rating designating that it should not be viewed by those under the age of 17. However, the inclusion of the three suggestive scenes in issue in a film which does not have the dominant theme of appeal to prurient interest and is a serious bona fide artistic work, does not warrant its subjection to the criminal penalties of the child pornography statute.

The parties have submitted no decisions, and the court has located none, where criminal child pornography statutes have been applied to non-explicit sexually suggestive scenes in a theatrical film having a dominant non-sexual theme and having undisputed artistic merit⁷. Although there may be cases in which Oklahoma's child pornography prohibitions may properly be applied to professionally

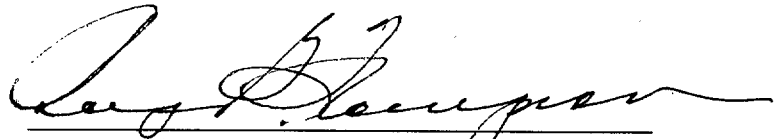
⁷*Reported decisions applying Oklahoma and federal child pornography laws illustrate the material subjected to criminal prosecution. See Shultz v. State, 811 P.2d 1322 (Okla. Crim. App. 1991) (adult videotaped himself engaging in sexual acts with his 12-year-old stepdaughter); United States v. Reedy, 632 F. Supp. 1415 (W.D.Okla. 1986), aff'd, 845 F.2d 239 (10th Cir. 1988) (adult who photographed his stepdaughter and another minor female in sexually explicit poses was prosecuted under the federal child pornography laws); United States v. Wolf, 890 F.2d 241, 243 (10th Cir. 1989) (defendant was prosecuted for federal child pornography based on taking sexually explicit nude photographs of a five-year-old girl).*

produced films, each case must be examined to determine if such penalties are warranted. Applying the bona fide work of art exception to the statute will not affect the state's ability to attack hard core child pornography; it will require only that the exception be considered before material may be subjected to the law.

While the state has every right and duty to prohibit and criminalize such a profound evil as child pornography, under the facts and law presented here, the court concludes that the film in issue is not one that violates the law as claimed.⁸

For the foregoing reasons, plaintiff's motion for summary judgment is DENIED, and defendants' motion for summary judgment is GRANTED. Judgment shall enter in favor of defendants and against plaintiff.

IT IS SO ORDERED this 20 day of October, 1998.


UNITED STATES DISTRICT JUDGE

⁸Because the court concludes that the statutory exception applies, it is not necessary to address defendants' alternative argument that the statute is unconstitutionally over broad in the absence of that exception. Applying the exception on a case-by-case basis will cure defendants' concerns about the statute's potential prohibition of material otherwise protected by the First Amendment, consistent with Ferber's view that case-by-case analysis should be employed to avoid impermissibly restricting protected expressions and allow the state to criminalize hard-core pornography having no First Amendment protection.