

IN THE SUPREME COURT OF MISSOURI

STATE EX REL.,)	
W. Stephen Geeding, County Prosecutor)	
In and for McDonald County, Missouri)	
Respondent - Petitioner below)	
)	
vs.)	Case No.: SC85249
)	
ROBERT W. CRUMP, JR.,)	
a/k/a Rob Crump,)	
d/b/a Midnight Video South)	
Appellant - Respondent below)	
)	
and)	
)	
Pine Designs, Inc.,)	

APPEAL FROM THE CIRCUIT COURT OF MCDONALD COUNTY,
MISSOURI
40TH JUDICIAL CIRCUIT - CASE NO. CV102-693CC

THE HONORABLE JOHN LEPAGE, JUDGE

APPELLANT'S REPLY BRIEF

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ARGUMENT

Respondent has misled the court with allegations that the distance between appellant Crump's Pineville store and the store in Joplin is "just down the road." See respondent's brief at page 6, 22 and 23. This statement comes from a response which Rob Crump made to questions asked to him by respondent's counsel. Appellate Courts in this state take judicial notice of the geographical location of cities in the state and the approximate distances between them. See *Maxwell v. City of Hayti*, 985 SW 2d 920, 922 (Mo. App. SD 1999) and see also *State v. Heissler*, 324 SW 2d 714, 716 (MO 1959). The Missouri Official highway Map shows a distance of approximately 36 miles between Joplin and Pineville.

Respondent also incorrectly alleges the standard of proof to be applied when determining a statute is unconstitutional. Respondent alleges at page 17 of its brief that in determining whether or not a statute is constitutional appellant must prove "beyond a reasonable doubt" that the legislature abused its discretion, and cites as authority in support of that position the case of *Blaske v. Smith and Entzeroth, Inc.*, 821 SW 2d 822, 829 (MO. Banc 1991). Respondent's again alleges this standard at page 27 of its brief. The standard cited by respondent is only applicable in situations involving equal protection claims. What this court said in *Blaske* was "...with respect to the

claim that a statutory classification is violative of equal protection, a challenger must prove abuse of legislative discretion beyond a reasonable doubt and, short of that, the statute is valid.” The claim here is not of violation of equal protection but rather violation of due process. Thus, the standard of proof and standard of review related by appellant in its brief is the correct standard to be applied by this court.

Finally, respondent’s reliance on *Acara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) is misplaced. *Acara* was based on First Amendment issues not due process issues. It involved a statute similar to the one here, however, that statute included property where “prostitution” took place and had no reference to conduct causing the spread of HIV. More specifically the trial court found evidence that prostitution was taking place on the property as a basis for issuing an injunction closing the property for a year. There the defendant’s argued that the First Amendment requires a statute incidentally effecting speech to be no broader than necessary to achieve its purposes and that ordering the premises closed for a whole year was much broader than was necessary since an injunction could have been issued only against the illegal activity on the property. The Supreme Court reviewed the statute, not in light of whether or not it was so vague as to deny due process, but rather as to whether or not the application

of the statute violated the First Amendment because it allowed the court to prohibit all use of the property for a period of one year including prohibiting the operation of the adult bookstore located thereon. The court held primarily that for First Amendment scrutiny to apply, the regulated activity had to have some element of protected expression and that clearly prostitution had no First Amendment protection. The Court went on to state that the First Amendment does not protect from governmental regulations that apply equally to all property owners such as sewage treatment ordinances or fire codes. Finally, the court recognized that all civil and criminal regulation has some impact on First Amendment activities and it is only when the impact singles out expressive activity that the First Amendment is implicated.

Appellant does not here nor did it at the trial court level contend that First Amendment scrutiny should be applied to the conduct in question.. Appellant does contend that under the third prong of the *Grayned* test, extra scrutiny should be placed upon governmental regulations which impact the First Amendment area. In other words, statutes which have First Amendment impact either directly or indirectly must do so with precise clarity. It is this precise clarity which is lacking in Section 191.680 V.A.M.S.

Accordingly, appellant believes that the issues raised in respondent's brief failed to refute appellant's primary contention that the statute in question as applied directly to the facts of this case and as applied by the trial court acted to deprive appellant the use of his property without due process of law.

MOOTNESS

The record discloses that the judgment of the trial court was issued on March 7, 2003 for a period of one year. Thus, the trial court's injunction will have expired by the time this case is argued before the court. Although not addressed by counsel for respondent, because the possibility that this court will raise the question of its jurisdiction *sua sponte*, counsel would be remiss in failing to address that issue.

Counsel would point out to the court that appellant's brief was filed herein on November 6th, 2003. Given normal briefing schedules, this case would have in all likelihood been argued during the January term of this court well before the injunction expired. Unfortunately due to the death of counsel retained by respondent to prepare its appellate brief in this case, respondent's briefing time was extended for a period of approximately 60 days. While appellant recognizes that the untimely death of the

aforementioned counsel was beyond the control of respondent, it would appear to be unjust to appellant to be deprived of the right of judicial review due to the untimely death of counsel who was retained specifically for the purpose of writing the appellate brief and who was not trial counsel. More specifically however counsel would note that “An appellate court, however, may decide an otherwise moot issue if it is of general public interest and importance, recurring in nature and will otherwise evade appellate review.” *In the interest of R.T.T., a minor J.K.T. Petitioner v. Ringer*, 26 SW 3rd 380 (Mo. App. SD 2000) at page 834. See also *Shapiro v. Columbia Union National Bank and Trust Co.*, 576 SW 2d 310 (Mo. Banc. 1979) at page 315 where the court stated “Mootness does not preclude a decision where the question is one of great public importance and involves public rights or interests under conditions which may readily reoccur.”

We believe that this case involves a situation of great public importance and involves circumstances which may well reoccur. The statute in question, Section 191.680 V.A.M.S. has never been considered by an appellate court in the State of Missouri. Prior to the 2002 Amendment, the statute had not readily been used because it was only enforceable by a public health department. The 2002 Amendment to the statute allowed for its enforcement by local prosecuting attorneys. Although counsel is unaware of

any other county in the State of Missouri where local prosecutors have attempted to enforce the statute in question against other adult bookstores, it would seem only natural that, depending upon the outcome of this Court's decision, there is substantial likelihood that other prosecutors may attempt to enforce it. Because of the potential impact on First Amendment activities that increased enforcement of the statute in its present form will bring, the public, prosecutors and operators of adult entertainment facilities have a right to know how the statute will be construed and applied.

Of additional significance is the fact that with respect to this appellant, he was the owner of the property in question. Although there is no way to create a record on issue, counsel assures the court that Mr. Crump continues to own the property and it is his desire to reopen his business at the same location after the expiration of the injunction. The record does establish that Mr. Crump owns another video store with an arcade in Joplin, and thus, is likely to face this issue again either in his McDonald County store or in his Joplin store.

Finally, there is still the issue of liability for payment of costs that were assessed against appellant in the trial court's judgment. LF-53. A decision by this court will determine appellant's liability for costs which is another reason why the case is not moot. See, *State ex rel. Henderson v.*

Cook, 182 SW 2d 292, 294 (MO Banc. 1944). Accordingly, because of the public importance of the issues involved, the likelihood of reoccurrence of those issues and because of the need to determine liability for costs, appellant would pray this court to render an opinion fully adjudicating the rights of the parties.

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CERTIFICATE PURSUANT TO RULE 84.06(c)

I, William J. Fleischaker, counsel for Appellant, Robert R. Crump, Jr., hereby certify that two (2) true and correct copies of Appellant's Reply Brief were mailed this 16th day of February, 2004 to Respondent's counsel as follows:

W. Stephen Geeding
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1. That the Brief complies with the limitations contained in Rule 84.06(b);
2. That there are 1671 words and 202 lines in the brief;
3. That the disk containing appellant's reply brief has been scanned for viruses and that it is virus-free.

FLEISCHAKER, WILLIAMS & POWELL

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