U.S. Supreme Court

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989)

Fort Wayne Books, Inc. v. Indiana

No. 87-470

Argued October 3, 1988

Decided February 21, 1989*

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Syllabus

In No. 87-470, the State of Indiana and a local prosecutor (respondents) filed a civil action in state court against petitioner operator of an "adult bookstore," alleging that it had violated the state Racketeer Influenced and Corrupt Organizations (RICO) statute by engaging in a pattern of racketeering activity consisting of repeated violations of the state laws barring the distribution of obscene books and films. Respondents sought injunctive relief under the state Civil Remedies for Racketeering Activity (CRRA) statute, including forfeiture of all of petitioner's property used in the alleged racketeering activity, and moved, in a separate petition, for a court order for immediate seizure of all property subject to forfeiture, as authorized by statute. After the court, *ex parte,* heard testimony in support of this petition, it ordered the immediate seizure of petitioner's bookstore and its contents. Following petitioner's unsuccessful attempts to vacate the seizure order on federal constitutional grounds, the court certified the constitutional issues to the Indiana Court of Appeals, which held that the relevant RICO/CRRA provisions violated the Federal Constitution. The Indiana Supreme Court reversed, upholding both the constitutionality of the CRRA statute and the pretrial seizure. In No. 87-614, petitioner "adult bookstore" operator was charged with distributing obscene matter in violation of an Indiana statute (a misdemeanor) and in addition with RICO violations (felonies) based on these alleged predicate acts of obscenity. The trial court dismissed the RICO charges on the ground that the RICO statute was unconstitutionally vague as applied to obscenity predicate offenses. The Indiana Court of Appeals reversed and reinstated the charges, holding that the RICO statute was not unconstitutional as applied to the state obscenity statute, and the Indiana Supreme Court declined review.

Held:

1. This Court has jurisdiction to hear No. 87-614. Under the general rule defining finality in the context of a criminal prosecution by a judgment of conviction and the imposition of a sentence, this Court would usually conclude that, since neither a conviction nor sentence was present here, the judgment below was not final, and hence not reviewable under 28 U.S.C. § 1257, which limits review to "[f]inal judgments or

decrees." But the case merits review under the exception to the general finality rule recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 420 U. S. 482-483,

"[w]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action."

Petitioner could well prevail on nonfederal grounds at a subsequent trial, and reversal of the Indiana Court of Appeals' holding would bar further prosecution on the RICO charges. Moreover, the case clearly involves a First Amendment challenge to the Indiana RICO statute's facial validity. Adjudicating the proper scope of First Amendment protection is a "federal policy" that merits application of an exception to the general finality rule. Resolution of the important issue of the possible limits the First Amendment places on state and federal efforts to control organized crime should not remain in doubt. *Flynt v. Ohio*, 451 U. S. 619, distinguished. Pp. 489 U. S. 54-57.

2. There is no constitutional bar to the State's inclusion of substantive obscenity violations among the predicate offenses under its RICO statute. Pp. 489 U. S. 57-60.

(a) The RICO statute is not unconstitutionally vague as applied to obscenity predicate offenses. The "racketeering activities" that the statute forbids are a "pattern" of multiple violations of certain substantive crimes, of which distributing obscenity is one. Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either. Petitioner in No. 87-614 cannot be convicted of violating the RICO statute without first being "found guilty" of distributing or of attempting or conspiring to distribute obscene materials. To argue, as petitioner does, that the "inherent vagueness" of the obscenity standards established by *Miller v. California*, 413 U. S. 15, are at the root of his objection to any RICO prosecution based on predicate acts of obscenity is nothing less than an invitation to overturn *Miller* -- an invitation that this Court rejects. That the punishments available in a RICO prosecution are different from those for obscenity violations does not render the RICO statute void for vagueness. Pp. 489 U. S. 57-58.

(b) While the RICO punishments are greater than those for obscenity violations, there is no constitutionally significant difference between them. The stiffer RICO punishments may provide an additional deterrent to those who might otherwise sell obscene materials and may result in some booksellers practicing self-censorship and removing First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state obscenity laws,

and the mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional. Petitioner's contention in No. 87-614 that the civil sanctions available under the CRRA against RICO violations are so severe as to render the RICO statute itself unconstitutional is not ripe, since the State has not sought any civil penalties. Pp. 489 U. S. 59-60.

(c) There is no constitutional basis for petitioner's contention in No. 87-614 that the alleged predicate acts used in a RICO/obscenity prosecution must be "affirmed convictions." As long as the standard of proof is proper with respect to all elements of the RICO allegation, including proof, beyond a reasonable doubt, of the requisite number of constitutionally proscribable predicate acts, all of the relevant constitutional requirements have been met. This Court will not require a State to fire a "warning shot" in the form of misdemeanor prosecutions before it may bring felony charges for distributing obscene materials. And there is no merit to petitioner's contention that the predicate offenses charged must have occurred in the jurisdiction where the RICO indictment is brought, not only because all of petitioner's alleged predicate acts of distributing obscenity did take place in the same jurisdiction where the RICO prosecution was initiated, but more significantly because such a rule would essentially turn the RICO statute on its head. Pp. 489 U. S. 60-62.

(d) Nor is there any merit to petitioner's contention in No. 87-614 that he should have been provided with a prompt post-arrest adversarial hearing on the question of the obscenity of the materials he allegedly distributed. He did not request such a hearing, and there was no seizure of any of his books or films. Police officers' purchases of a few items in connection with their investigation of petitioner's stores did not trigger constitutional concern. P. 489 U. S. 62.

3. The pretrial seizure of petitioner's bookstore and its contents in No. 87-470 was improper. While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, books or films may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing. The risk of prior restraint, which is the underlying basis for the special Fourth Amendment protection accorded searches for and seizures of First Amendment materials, renders invalid the pretrial seizure here. Even assuming that petitioner's bookstore and its contents are forfeitable when it is proved that they were used in, or derived from, a pattern of violations of the state obscenity laws, the seizure was unconstitutional. Probable cause to believe that there are valid grounds for seizure is insufficient to interrupt the sale of presumptively protected books and films. Here, there was no determination that the seized items were "obscene" or that a RICO violation *had occurred.* The petition

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for seizure and the hearing thereon were aimed at establishing no more than probable cause to believe that a RICO violation had occurred, and the seizure order recited no more than probable cause in that respect. Mere probable cause to believe a violation has transpired is not adequate to remove books or film from circulation. The elements of a RICO violation other than the predicate crimes remain to be established in this case. Where the claimed RICO violation is a pattern of racketeering that can be established only by rebutting the presumption that expressive

materials are protected by the First Amendment, that presumption is not rebutted until the claimed justification for seizing such materials is properly established in an adversary proceeding. Pp. 489 U. S. 62-67.

No. 87-470, 504 N.E.2d 559, reversed and remanded; No. 87-614, 505 N.E.2d 504, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in Part I of which REHNQUIST, C.J., and BRENNAN, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined, in Part II-A of which REHNQUIST, C.J., and BRENNAN, STEVENS, SCALIA, and KENNEDY, JJ., joined, in Parts II-B and II-C of which REHNQUIST, C.J., and BLACKMUN, SCALIA, and KENNEDY, JJ., joined, and in Part III of which REHNQUIST, C.J., and BRENNAN, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 489 U. S. 68. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, *post*, p. 489 U. S. 68. STEVENS, J., filed an opinion dissenting in No. 87-614 and concurring in part and dissenting in part in No. 87-470, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 489 U. S. 70.