COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 5, 1995

No. 94-3390

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JOSEPH SCHULTZ d/b/a THE ISLAND BAR,

Plaintiff-Appellant,

v.

CITY OF CUMBERLAND,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Joseph Schultz, d/b/a The Island Bar, appeals a judgment upholding the revocation of his liquor license. The City of Cumberland Common Council revoked his license under § 125.12(2)(ag)2, STATS., finding that Schultz maintained a "disorderly or riotous, indecent or improper house" based on public displays of sexual acts and prostitution on the premises. Schultz argues that § 125.12(1)(ag)2 is unconstitutionally overbroad

and that the facts of this case do not justify revocation of his license. We reject these arguments and affirm the judgment.

Schultz lacks standing to challenge the statute on the basis of overbreadth. In ***Broadrick v. Oklahoma***, 413 U.S. 601, 610 (1973), the Supreme Court summarized the law relating to standing in First Amendment cases. A person may not challenge a statute if his conduct is clearly unprotected. The courts have granted greater latitude for standing to challenge overbreadth when it involves the First Amendment, recognizing that the First Amendment needs "breathing space" and statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. Litigants are allowed to challenge a statute when freedom of expression is at stake, not because their own rights are violated, but because of the court's concern that the statute may cause others to refrain from constitutionally protected expression. Claims of overbreadth generally apply only to spoken words or where the statute burdens "innocence associations." Overbreadth claims are not entertained when evoked against ordinary criminal laws and overbreadth scrutiny is less rigid in the context of statutes that regulate conduct "in the shadow of the First Amendment" but doing so in a neutral, noncensorial manner. ***Id***. at 610-14.

Here, the First Amendment exception to the ordinary rules of standing does not apply because the acts in question, public sex and prostitution, are not protected by the First Amendment. ***Arcara v. Cloud Books, Inc.***, 478 U.S. 697, 705 (1986); ***Shillcutt v. State***, 74 Wis.2d 642, 646, 247 N.W.2d 694, 696 (1976); ***State v. Panno***, 151 Wis.2d 819, 830, 447 N.W.2d 74, 79 (Ct. App. 1989). Because § 125.12(2)(ag)2, STATS., does not, on its face, address protected speech or assembly and its enforcement in this case is based on laws designed to prohibit conduct that is not protected by the First Amendment, only a person whose lawful First Amendment rights are affected by this statute has standing to challenge the statute on the basis of overbreadth.[1]

[1] Although our ruling makes its unnecessary to rule on the constitutionality of § 125.12(2)(ag)2, STATS., we note that each of the words used in this statute, "disorderly," "riotous," "indecent," and "improper," have been found not to be constitutionally overbroad as used in other statutes and regulations. *See* ***State v. Zwicker***, 141 Wis.2d 497, 509, 164 N.W.2d 512, 519 (1969), and ***United States v. Sroka***, 307 F. Supp. 400, 401 (E.D.

We also reject the argument that the conduct that occurred on the premises was insufficient to justify revocation of Schultz's liquor license. The common council's findings of fact include several occurrences of public sexual acts between patrons of the bar and its female performers. Police officers testified to witnessing the nude entertainers performing fellatio on patrons in exchange for money. They also reported witnessing numerous acts of cunnilingus and several masturbatory acts occurring between the entertainers and the patrons. Schultz, as licensee, is responsible for the activities occurring on the licensed premises. ***Reismier v. State,*** 148 Wis. 593, 598, 135 N.W. 153, 155 (1912). Schultz's lack of knowledge or notice of the activities does not negate his responsibility. *Cf.* ***State v. Panno,*** 151 Wis.2d 819, 826, 447 N.W.2d 74, 77 (closing an adult bookstore as a nuisance required no proof of the owner's knowledge of lewd activities). Whether the performers were technically or legally Schultz's agents does not affect his responsibility for the activities occurring in his bar.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

Wis. 1969).