10-1-1992

Alexander v. Thornburgh, 943 F.2d 825 (8th Cir. 1991)

rion is still in the public interest.
-M.D.B.

ALEXANDER V. THORNBURGH, 943 F.2D 825 (8TH CIR. 1991).

Ferris J. Alexander, Sr., defendant, was in the adult entertainment business for over thirty years, showing movies, selling magazines and selling and leasing video cassettes. It was shown at his criminal trial that he had consolidated many of his various theater and bookstore businesses under corporation titles, and substituted names of his employees as a front to conduct his businesses. None of these corporations filed income tax returns, and two of the corporations were used to purchase another bookstore and real estate. It was estimated that Alexander underreported his 1982 gross receipts by $1,322,135 and by $1,416,883 in 1983. In addition, the trial jury found four magazines and three videos from his business to be obscene.

Alexander was convicted on 24 counts of a 41 count indictment in the U.S. District Court for the District of Minnesota for tax offenses, obscenity offenses, and Racketeer Influenced Corrupt Organizations Act (RICO) violations. He was sentenced to 36-72 months of imprisonment, fined well in excess of $100,000, and ordered to forfeit his interest in ten pieces of real estate acquired from the proceeds of his racketeering activity. Alexander appealed the conviction, the fines, and the forfeiture on the basis that:

(1)the indictment alleged and the evidence showed, if anything, multiple conspiracies and not one conspiracy to defraud the IRS;
(2)the count was defective because it charged a general conspiracy rather than a conspiracy to violate a specific statute;
(3)the jury's verdicts on the transportation of obscene materials counts were inconsistent;
(4)the application of the forfeiture provisions of RICO were unconstitutional because they criminalized non-obscene expressive material, violated the First and Eighth Amendments, and the obscenity standards violated his due process rights;
(5)there was insufficient evidence on all counts to sustain the verdict below; and,
(6)the District Court should not have entered a summary judgment against him in his civil suit against the government challenging the use of obscenity as a predicate to RICO on First Amendment grounds.

The Eighth Circuit Court of Appeals affirmed Alexander's conviction on all counts. The court held that whether a conspiracy

is one scheme or several is a question for the jury, and in this case, the evidence supported a jury finding of a single conspiracy to defraud the IRS spanning many years and involving many individuals in Alexander's businesses. The cases that Alexander relied upon for his defense to these counts were expressly limited to their facts. Also, the court instructed the jury that when a count alleges two different videotapes or magazines to be obscene, they need find only one of them obscene in order to return a guilty verdict. Thus, the verdicts returned on the obscenity counts were not inconsistent. The standard of obscenity that Alexander challenged was laid down by the United States Supreme Court in *Miller v. California*, and therefore the circuit court was bound by it. The forfeiture, provided by 18 U.S.C. § 1467, is allowed when there is a sufficient nexus between racketeering activities and protected materials acquired through such activities. The court held that obscenity is not protected by the First Amendment, and a convicted racketeer may not launder dirty money by investing it in materials that involve protected speech. It also held that there was no unconstitutional chilling effect at work because this forfeiture was a criminal penalty and not a prior restraint. Further, the court held that the penalties imposed did not violate Alexander's Eighth Amendment rights, and there was ample evidence to support his conviction on all counts.

-C.L.

BOURNE CO. V. TOWER RECORDS, INC., 976 F.2D 99 (2D CIR. 1992).

Walt Disney Company and Buena Vista Home Video appealed from a preliminary injunction issued by the United States District Court for the Southern District of New York, barring their use of songs from the movie "Pinocchio" on videocassette trailer advertisements.

In 1939, Disney and Bourne entered into a copyright agreement which assigned to Bourne copyrights to the songs from the movie "Pinocchio." Disney claimed that the agreement allowed them to freely use the songs but only gave Bourne the right to collect fees for the use of the songs by third parties. Bourne claimed that, under the agreement, Disney relinquished all rights to the songs, except for the right to employ them in public performances of motion pictures. Regardless of the proper meaning of the agreement, over the next five decades Disney used the songs in ways inconsistent with Bourne's view of its agreement with Disney. However, Bourne did not object to Disney's use of the songs until