

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JAN - 6 2005
DAVID J. MALAND, CLERK
BY DEPUTY _____

DWIGHT WESLEY MILLER

Plaintiff,

vs.

City of Pilot Point, Texas and the Pilot
Point Police Department

Defendants.

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CIVIL ACTION NO. 4:05 CV 4

PLAINTIFF'S ORIGINAL COMPLAINT

COMES NOW Plaintiff Dwight Wesley Miller and files his Original Complaint, complaining of the City of Pilot Point, Texas, and the Pilot Point Police Department.

INTRODUCTORY STATEMENT

1. This is a lawsuit seeking declaratory and injunctive relief to protect Plaintiff's First Amendment rights to freedom of expression. Plaintiff has displayed, on the exterior wall of his art gallery, a mural depicting the Creation of Eve. Because Eve's breasts were bare in the mural, the Pilot Point Police Department repeatedly threatened, in writing, to prosecute Plaintiff under a criminal statute aimed at those who would victimize children by selling or displaying to them hard-core pornography. To avoid the expense and embarrassment of being charged, however baselessly, with such a sordid crime, Plaintiff was forced to cover Eve's breasts before a deadline set by the Pilot Point Police Department. Plaintiff seeks from this Court protection from Defendants' unconstitutional application to him of this criminal statute.

PARTIES

2. Plaintiff Dwight Wesley Miller is a resident of Pilot Point, Texas, located in Denton County, Texas.

3. Defendants City of Pilot Point and the Pilot Point Police Department are located in Denton County, Texas.

JURISDICTION AND VENUE

4. This case arises under the First Amendment to the United States Constitution, and this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201 and 42 U.S.C. § 1983. The Court may grant declaratory relief pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure (“FRCP”).

5. The Court has personal jurisdiction over the Defendants, which are located in Denton County, Texas.

6. Venue in this district is proper because the Plaintiff resides in the Eastern District of Texas, and the Defendants are located in the Eastern District of Texas.

BACKGROUND FACTS

7. Dwight Wesley Miller owns and operates an art gallery, the Farmers and Merchants Gallery, at 100 N. Washington, Pilot Point, Texas. The gallery is housed in a building that was formerly a bank, the Farmers and Merchants Bank.

8. Miller commissioned a local artist, Justine Wollaston, to paint a mural on an exterior wall of the Farmers and Merchants Gallery (“the Mural”). A photograph of the building and the Mural in its original state is attached as **Exhibit A** to this Complaint. The Mural borrows heavily from Michelangelo’s Sistine Chapel ceiling in Rome, and in particular from a portion of the Sistine ceiling painting which depicts God reaching out to touch Adam. In the Mural,

Wollaston uses the feature of God's outstretched arm from the Michelangelo masterpiece. The outstretched arm is by far the single largest element in the work. At the far end of the Mural sits a nude Eve, in a pose that is a variation on that of Adam in the Michelangelo Creation scene. God's finger points at an apple, a traditional image of the forbidden fruit in the Garden of Eden, suspended between God and Eve. The rendering of Eve, while somewhat realistic, is stylized.

9. While some citizens of Pilot Point commented favorably on the Mural, others complained to the police department about Eve's nudity.

10. Plaintiff received notice from the Pilot Point Police Department, dated July 14, 2003, informing him "that the mural was "in violation of Texas Penal Code § 43.24 titled Sale, Distribution, or Display of Harmful Material to Minor." The notice stated: "This letter will serve as a notice that you have until August 4th, 2003 to comply with the above mentioned Penal Code violation [sic] to avoid criminal prosecution." A copy of the notice is appended to this Complaint as **Exhibit B**. The deadline in the original notice was later extended.

11. The criminal statute referenced in the notice, Texas Penal Code § 43.24, is aimed at those who sell or display to minors hard-core pornography that would be harmful to those minors. To be arrested and charged with such a sordid offense would be extremely embarrassing, regardless of the eventual outcome of the criminal prosecution.

12. In a letter dated August 11, 2003 to then Police Chief Carney and to James Edland, then a police sergeant and now Chief of the Pilot Point Police, Miller asked the police to drop the threat of prosecution. Edland wrote back in a letter dated August 12, 2003, stating that due to the number of Pilot Point citizens "asking for some type of action against the painting," the police were unable to grant Miller's request that the threat of prosecution be dropped. A copy of Edland's August 12, 2003 letter is attached as **Exhibit C**.

13. In order to avoid the threatened arrest and criminal prosecution, Plaintiff covered selected portions of Eve's anatomy with a "Crime Scene Banner" tape. A copy of a photograph of part of the Mural after the "Crime Scene Banner" was put on is attached as **Exhibit D**. Pilot Point Police Sergeant James Edland stated that covering Eve's breasts with the crime scene banner put the Mural in compliance with the law. The "Crime Scene Banner" blew off on April 9, 2004. Eve's breasts have subsequently been covered in part with artificial flowers.

14. The Plaintiff has at all times wished to display the Mural in its original form, but has been prevented from doing so by the Pilot Point Police Department threat to prosecute him under Texas Penal Code § 43.24. Plaintiff believes that the measures he has been forced to take to avoid prosecution by covering Eve's breasts have detracted from the artistic statement of the Mural and have had the effect of making it appear tawdry.

15. The inappropriate application of such a criminal statute to prevent display of the Mural drew immediate press coverage and commentary from around the nation. To take one example, the Pilot Point Police Department received a 2003 "Muzzle Award" from the Thomas Jefferson Center for the Protection of Free Expression, a non-partisan, not-for-profit entity in Virginia.

16. In order to constitute "harmful material" under Texas Penal Code § 43.24, the Mural would have to be "material whose dominant theme taken as a whole: (A) appeals to the prurient interest of a minor, in sex, nudity, or excretion; (B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and (C) is utterly without redeeming social value for minors."

17. Although the Mural is susceptible to different interpretations as to the commentary it is making on the Biblical story of the creation of Eve, some commentary on that

story is plainly the “dominant theme” of the work. The outstretched arm is widely recognizable as that of God, and the apple is widely recognizable as the forbidden fruit in the Garden of Eden. Given the context, Eve is also recognizable as Eve.

18. It cannot be said that such a “dominant theme taken as a whole” as a commentary on the relationship of God, Eve, and the forbidden fruit from the Biblical creation story “appeals to the prurient interest of a minor, in sex, nudity, or excretion” Nor can it be said that such a “dominant theme taken as a whole” is “patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors” Nor can it be said that such a “dominant theme taken as a whole” is “utterly without redeeming social value for minors.” Yet all three of these conditions would have to be true of the “dominant theme” of the Mural in order for it to be classified as “harmful material” under § 43.24.

**COUNT NO. I:
FOR A DECLARATION THAT DEFENDANTS’ APPLICATION OF TEXAS
PENAL CODE § 43.24 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS**

19. Plaintiff realleges Paragraphs 1 through 18.

20. Defendants the City of Pilot Point and the Pilot Point Police Department are government bodies and therefore subject to the Fourteenth Amendment to the United States Constitution, as well as to the First Amendment to the United States Constitution by virtue of the Fourteenth Amendment.

21. Under the First Amendment to the United States Constitution, Defendants may not abridge, directly or indirectly, the freedom of expression of members of the public such as Plaintiff Dwight Wesley Miller. By applying and enforcing Texas Penal Code § 43.24 in the way that they have and preventing Plaintiff from displaying the Mural on the side of his art gallery in its original form, Defendants have prevented Plaintiff from exercising his rights to

freedom of expression under the First Amendment, and thereby violated Plaintiff's First Amendment rights.

22. Defendants' conduct is actionable under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

23. As a result of Defendants' violations of the First and Fourteenth Amendments to the United States Constitution, Plaintiff has suffered and continues to suffer injury.

24. An actual controversy has arisen and now exists between Plaintiff and Defendants. Pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201-02, Plaintiff is entitled to a declaration of his rights and injunctive relief preventing the City of Pilot Point from arresting or charging him for display of the Mural in its original form, or in any other manner preventing him from displaying the Mural in its original form.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Dwight Wesley Miller respectfully requests that the Court:

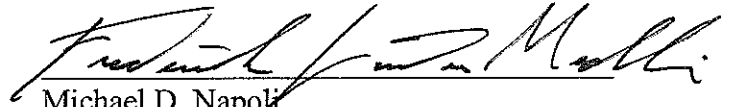
a. Issue a Declaratory Judgment declaring the rights and responsibilities of the parties to this action, and particularly declaring that the application by the City of Pilot Point and the Pilot Point Police Department of Texas Penal Code § 43.24 to prevent Dwight Wesley Miller's display of the Mural in its original state is unconstitutional and violates his rights under the First and Fourteenth Amendments;

b. Preliminarily and permanently enjoin the City of Pilot Point and the Pilot Point Police Department from arresting or charging Dwight Miller with a violation of Texas Penal Code § 43.24 based on his display of the Mural in its original state;

c. Award Plaintiff Dwight Wesley Miller his reasonable attorney's fees and costs;
and

d. Grant to Plaintiff such other, further, and different relief as may be just and proper.

Respectfully submitted,



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