

03-1631
MOTOR VEHICLE
SIGNED: 03-03-2004
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, P. DEPAULIS, M. JOHNSON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	ORDER
Petitioner,)	
)	Appeal No. 03-1631
v.)	
)	
MOTOR VEHICLE DIVISION OF)	Tax Type: Miscellaneous Taxes
THE UTAH STATE TAX)	
COMMISSION,)	Judge: Robinson
)	
Respondent.)	

Presiding:

R. Spencer Robinson, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
For Respondent: RESPONDENT REP. 1, Assistant Attorney General
 RESPONDENT REP. 2, from the Motor Vehicle Division

STATEMENT OF THE CASE

Petitioner applied for and received two personalized Utah license plates, one of which says "(PLATE A)," the other which says "(PLATE B)." On October 20, 2003, EMPLOYEE, Assistant Director of the Division of Motor Vehicles, sent letters to PETITIONER informing him that Respondent (the Division of Motor Vehicles) was recalling the above noted license plates.

On or about November 17, 2003, the parties participated in a telephone status conference. During the conference, the Petitioner explained the personalized plates were associated

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with his business. Respondent explained that the term “(X)” was slang for (WORDS REMOVED). Because of this meaning, Respondent took the position the personalized plates were prohibited. Petitioner requested re-determination.

Pursuant 59-1-502.5 (Utah Code Annotated, 1953, as amended)¹, this matter came before the Utah State Tax Commission for an Initial Hearing on January 29, 2004. Petitioner represented himself. Assistant Attorney General RESPONDENT REP. 1 represented Respondent.

FINDINGS OF FACT

Petitioner’s business name is “COMPANY.” The “(X)” portion is Petitioner’s initials, representing PETITIONER. The business telephone number is #####. On a telephone keypad, ##### is also “(X).”

The business name, “COMPANY” and the telephone number, listed as “(PLATE B),” appear on the doors of two trucks used in the business. The beds of the trucks are designed to carry (X). When loaded, (X) would be easily visible in the cargo area of the trucks. The front and rear of the vehicles do not depict any information relating to the business, with the exception of the personalized plates.

An Internet site, www.slangsearch.com, defines “(X) or (X),” as “(DEFINITION REMOVED).” No one has complained about the plates to either Petitioner or Respondent. Petitioner stated he has received compliments on the plates.

¹ All subsequent statutory references are to the Utah Code Annotated, 1953, as amended, unless otherwise indicated.

CONCLUSIONS OF LAW

Persons desiring personalized plates must apply to the Motor Vehicle Division of the Tax Commission (hereinafter Division) indicating the combination of letters, numbers, or both being requested as a registration number. 41-1a-412 (1). The Division may refuse requested combinations that “may carry connotations offensive to good taste and decency . . .” 41-1a-411 (2). Utah Administrative Rule R873-22M-34 clarifies this. R873-22M-34 (B)(1) prohibits issuance of personalized plates with “combination of letters, words, or numbers with any connotation that is vulgar, derogatory, profane, or obscene.” R873-22M-34 (B)(2) prohibits issuance of personalized plates with “combinations of letters, words, or numbers that connote breasts, genitalia, pubic area, buttocks, or relate to sexual and eliminatory functions.”

The review may include translations from a foreign language, an upside down or reverse reading, and reference sources such as dictionaries or glossaries of slang, foreign languages, or drug terms. R873-22M-34 (D)(1-3). The applicant’s declared definition, if provided, must also be considered. R873-22M-34 (E). A personalized plate issued in violation of the statute and rule would have been issued in error. The Division has authority to revoke license plates if it determines they were issued in error. 41-1a-110(1)(a).

Application of the statute and rule is to be made from the perspective of “the objective, reasonable person.” McBride v. Motor Vehicle Div. of Utah State Tax Comm'n., 977 P.2d 467 (1999). This standard has also been described as the reasonable, prudent person standard.

DISCUSSION

The difficulty in applying the objective, reasonable person standard to questions of what is “vulgar, derogatory, profane, or obscene,” is perhaps best illustrated by what former United States Supreme Court Justice Potter Stewart said in Jacobellis v. Ohio, 378 U.S. 184; 84 S. Ct. 1676; 12 L. Ed. 2d 793 (1964).

It is possible to read the Court's opinion in Roth v. United States and Alberts v. California, 354 U.S. 476, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, n1 that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. n2 I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Notwithstanding the difficulty articulated by Justice Stewart, “the Commission [must] determine, in light of all the evidence presented, whether an objective, reasonable person would conclude that the term [on the license plate] contains any vulgar, derogatory, profane, or obscene connotation,” McBride, supra, at 471. The Commissioners are not to rely upon the opinion of any one person, (even if that person were former Justice Stewart, who knows it when he sees it) or upon their individual opinions. Id., at 470. Similarly, they must not rely on the general public’s perception, or any one group’s perception. Id. Also rejected by the Court as a standard was “some people” finding the term offensive. Id.

The Commission finds the objective, reasonable person is not any one person or group of people. It is not the general public. It is not the oxymoronic “reasonable, prudish person,”

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nor is it the equally oxymoronic “reasonable, prurient person.” The former is excessively concerned with being or appearing to be proper, modest, or righteous. The latter has an inordinate interest in sex. Neither is objective or reasonable.

The Court approved the standard employed by the California Court of Appeals in Kahn v. Dept. of Motor Vehicles, 16 Cal. App. 4th 159, 20 Cal. Rptr. 2d 6 (Ct. App. 1993). The Kahn test is what a person of ordinary intelligence, who knows the language in question, would understand from the use of the word. The McBride court said, “If such a person would conclude that the term carries a prohibited connotation, rule 873-22M-34 prohibits the Commission from issuing a license plate carrying that term.”

This test focuses on more than a prohibited meaning being present in reference materials. If that were the test, reference materials would determine outcome. While such a test would be easy to apply, it would be inconsistent with Kahn and McBride. It would also be inconsistent with the language in R873-22M-34 (D), which states the review “may include” reference materials. The Rule does not make reference materials outcome determinative. It does not require they be considered. It merely allows them to be considered.

An objective, reasonable person, of ordinary intelligence, who knows the language in question, does not know all of the meanings contained in slang dictionaries. Such person is not going to see “(PLATE A)” or “(PLATE B)” and look up the word “(X)” to see if a slang dictionary attributes an inappropriate meaning to the word.

Additionally, making reference materials the sole measure would violate another subsection of R873-22M-34 (E). Subsection (E) mandates consideration of the applicant’s declared

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definition. Relying solely on the presence of a term in an on-line dictionary makes subsection (E) a nullity.

The Commission finds that the test is whether, in the ordinary course of daily life, the objective, reasonable person, of ordinary intelligence, who knows the language in question, on seeing a personalized license plate, and being neither prudish nor prurient, *would conclude* that an inappropriate connotation for a word appearing on a license plate exists.

In this case, the Division apparently determined the usage of the word “(X)” in the license plates necessarily included a “connotation that is vulgar, derogatory, profane, or obscene,” (R873-22M-34(B)(1) or that the term connoted genitalia or a sexual function (R873-22M-34(B)(2) based on the entry in the internet source, www.slangsearch.com. The Division pointed out no other consideration listed in R873-22M-34(D).

There may be uses of the term “(X)” on a license plate, which, in conjunction with other numbers or letters not employed in this case, an objective, reasonable person would see as something vulgar, derogatory, profane, or obscene, or as something connoting genitalia or a sexual function. Those uses are not present in this case. Nothing about (X) or (#) suggests that (X) connotes something prohibited.

A recent case decided by the Commission illustrates application of the objective, reasonable person standard. The license plate at issue in that proceeding was “(PLATE C).” The Division received a written complaint regarding that license plate. The complaint also cited the language on the license plate frame surrounding the plate at the time the complainant saw it. The frame allowed an objective, reasonable person only one conclusion as to the meaning intended by the

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holder. The plate holder's assertion that the license plate referred to the suspension of his truck was not credible. Therefore, it was entitled to no weight under R873-22M-33 (E).

In this case, Petitioner asserts that the use of "(X)" on his license plates is related to his (X) business. In light of the evidence, this assertion is credible. If the only factor to be considered were the presence of an inappropriate connotation in an on-line slang dictionary, this credible assertion would be entitled to no weight, thus nullifying R873-22M-34 (E). Subsection (E) mandates consideration of the applicant's declared definition.

DECISION AND ORDER

Based on the foregoing the Commission reverses the decision of Respondent to revoke the license plates which state "(PLATE A)" and "(PLATE B)." An objective, reasonable person would not deem them to have a vulgar, derogatory, profane or obscene connotation, or to connote genitalia or a sexual function. Additionally, it appears the Division did not consider Petitioner's declared definition, as required by R873-22M-34 (E). Accordingly, the Petitioner's request for agency action, and Petition for Redetermination are hereby granted. Respondent shall permit Petitioner to reapply. Should he do so, Respondent shall issue the plates.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission

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Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

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Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2004.

R. Spencer Robinson
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2004.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
Commissioner

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