

Tuesday, October 7, 2008

Max Hardcore sentenced for obscenity conviction.

Photo from website of U.S. District Court (W.D. Mi.). What is obscenity? Nobody knows until the jury rules, because obscenity cannot be sufficiently defined. A jury across the courthouse hallway might even reach an opposite conclusion. Therefore, the Supreme Court's obligatory Miller obscenity test gives little First Amendment protection. The Miller doctrine requires that, inter alia, the jury determine "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15 (1973). If one self-censors to avoid the personal and financial cost of defending against an obscenity prosecution, the First Amendment is dishonored and battered. If one does not self-censor and is prosecuted for obscenity, the First Amendment also is dishonored and battered. Do not think for a moment that obscenity prosecutions will be limited only to such over-the-edge videos as those from Extreme Associates and Max Hardcore, both having branded themselves for rough and often degrading sex. Prosecutors focus on such extreme sexual material to avoid acquittals from jurors seeing images found on hotel pay-per-view, and to fly under the radar of a larger public outcry against such prosecutions, as prosecutors move closer and closer to prosecute films that depict sex that is little different than the activities of millions of married couples. Last week, Paul Little, who uses the stage name Max Hardcore, was sentenced to forty-six months in prison -- the bottom of the advisory federal sentencing guidelines (disclaimer: the links in this paragraph go to Adult Video News, which includes photos of suggestively-clad women) -- for his obscenity conviction after a jury trial last June 2008. I previously blogged about the case here (scroll down below the entry for today's blogpost). As defense team lawyer and class act Louis Sirkin told AVN, Max's previous drunk driving conviction bumped him from a level one criminal history to a level two criminal history, and thus increased his sentencing guidelines. This is among the reasons I warn my clients against jumping too quickly at pleading guilty to any crime. Here are some documents related to Max Hardcore's conviction and sentencing: - The court's denial of a new trial, which has a particularly noteworthy discussion of an allegation relating to a juror note that the judge allegedly failed to promptly disclose to the parties: The third instance of jury irregularity cited by Defendants occurred on the final day of jury deliberations, when a juror wrote a note to the Court requesting to speak to the Court because she had been fired from her job the night before. Defendants fault the Court for not speaking with the juror until after a verdict was reached in the case and for not notifying the parties of the note. Defendants argue that these failures prejudiced the Defendants. The Court disagrees. The note stated the following: "I wanted to know if I could speak to you regarding a matter that happened last night. When I got home from jury duty I received a phone call from my employer that he know [sic] longer wanted me to work for him. I feel it is because I have been on this jury. He tried to make other reasons for the termination but [illegible] of the things he said I know it was because of this. I was asked to call Ryan Barrack, an attorney in Clearwater who I will be meeting with. I was hoping we could talk about this." (Doc. No. 168, Exh. A.) As an initial matter, the Court notes that the juror did not ask to speak to the court immediately as Defendants suggest. The Court decided to wait until after the jury concluded its deliberations to speak with the juror, as the note concerned matters unrelated to the case and was purely a personal matter relating to the juror. Defendants seem to argue that had the Court spoken to the juror before a verdict was reached, the Court would have had to excuse the juror from jury service and declare a mistrial. This argument is wholly speculative. After the jury's verdict was published to the Court, each juror was polled as to whether the verdict as published was their verdict. Significantly, each juror including the juror in question said that the verdict as published was their verdict. The Court finds that Defendants have not shown that any of the above jury irregularities resulted in any prejudice to them or constituted a violation of their Sixth Amendment rights. It will be particularly interesting and important to see how the foregoing issue gets resolved on appeal. - The prosecution's sentencing memorandum. - Defendant's response to prosecutor's sentencing memorandum. Take note how the response tries to isolate the sentencing to activities in the Middle District of Florida. - The court's judgment against Hardcore. Finally, Tampa Bay Online relates the following exchange between Hardcore and the judge at sentencing: Hardcore said: "It just seems a very high price to pay, I think ... and I ask you to understand how much I've suffered." However, according to the news report, the judge was "unimpressed with Little's [Hardcore's] apologies, noting he had given interviews in which he ridiculed the charges against him. 'He was flip throughout the entire trial,' she said. 'He wasn't apologetic, as far as I can tell, until this morning.'" The article continues that Hardcore attorney James Benjamin "argued that the videos were not sadomasochistic. 'Urine and vomit, our argument is, isn't sadistic or masochistic.'" The judge replied: "'What about humiliation?' That, Benjamin replied, isn't in the legal definition of sadomasochistic. 'Clearly, there seemed to be pain,' [the judge] said. That was acting, Benjamin said. 'The person that was involved in the conduct sat [in court] with a smile on her face and wrote your honor a letter saying, 'Judge, this was a beautiful part of my life.'" "I don't even think this is a close call," the judge said. The videos portrayed 'sadistic conduct. This is clearly degrading, clearly humiliating and intended to be so.'" Hardcore lawyer Jeff Douglas said that before the jury ruled the prosecuted videos to be

obscene,Â Hardcore had "no way of knowing the activity he was engaged in was criminal."Â Now the case will be appealed. Thanks to Max Hardcore's defense lawyers -- allÂ fellow FALA members -- including those listed above, for fighting on his behalf and against the unconstitutional obscenity laws.Â Jon Katz

Posted by Jon Katz in Criminal Defense at 00:00