

Sandy Hobbs
Feb 4, 1985

CRIMINAL LAW

of

KENTUCKY

ANNOTATED

Complete to November 1, 1978

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Commonwealth of Kentucky
Julian M. Carroll, Governor

Department of Justice
John L. Smith, Secretary

Chapter 531

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- 531.350 Promoting sale of material portraying a sexual performance by a minor
- 531.360 Advertising material portraying a sexual performance by a minor
- 531.370 Using minors to distribute material portraying a sexual performance by a minor

COMMENTARY (1974)

The substantive provisions contained in Chapter 531 are the same as those contained in former KRS 436.101, and the penalties imposed are consistent. The substantive provisions were merely put into a format consistent with the rest of the Code.

531.010 Definitions

As used in this chapter:

(1) "Distribute" means to transfer possession of, whether with or without consideration.

(2) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines, or materials.

(3) "Obscene" means:

(a) To the average person, applying contemporary community standards, the predominant appeal of the matter, taken as a whole, is to prurient interest in sexual conduct; and

(b) The matter depicts or describes the sexual conduct in a patently offensive way; and

(c) The matter, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(4) "Sexual conduct" means acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse, or deviant sexual intercourse; or physical contact with the genitals, flagellation, or excretion for the purpose of sexual stimulation or gratification.

HISTORY: 1974 H 232, § 265, eff. 1-1-75

COMMENTARY (1974)

Two changes in definition were required by *Miller v. California*, 37 L. Ed. 2d 419 (1973). The *Miller* case set forth new guidelines for defining "obscene." It requires that the phrase "and which, taken as a whole, lacks serious literary, artistic, political, or scientific value" be added to the prior definition. This is intended to replace the requirement that the matter be "utterly without redeeming social value" which the Kentucky Court of Appeals rejected in *Cain v. Commonwealth*, 437 S. W. 2d 769 (1969), reversed, 397 U.S. 319 (1970).

The *Miller* case also requires that the phrase "the matter depicts or describes the sexual conduct in a patently offensive way" replace the phrase "which was substantially beyond customary limits of candor and description or representation of such matters" in the former definition.

The *Miller* case further requires that obscenity legislation be confined to another which depicts or describes sexual conduct. The sexual conduct must be specifically defined by applicable state law, or written or authoritatively construed. In light of this directive, a definition of "sexual conduct" was added. This definition will replace the phrase "a shameful or morbid interest in nudity, sex, or excretion" which is found in the former definition.

The *Miller* opinion also holds that obscenity is to be determined by applying "contemporary community standards", not "national standards."

Knowledge of the content and character of the matter remains an essential element and must be proven. *Smith v. California*, 361 U.S. 147 (1960). The holding in *Stanley v. Georgia*, 394 U.S. 557 (1969), that the mere possession of pornography by the individual in the privacy of his own home is protected by the First and Fourteenth Amendments would not appear to be affected by the *Miller* case.

CROSS REFERENCES

See *Brickey*, Kentucky Criminal Law § 25.11(1)(2)(3)

64 Ky L J 337 (1975). Kentucky Law Survey—Criminal Law, Gerald G. Ashdown.

531.020 Distribution of obscene matter

(1) A person is guilty of distribution of obscene matter when, having knowledge of its content and character, he:

(a) Sends or causes to be sent into this state for sale or distribution; or

(b) Brings or causes to be brought into this state for sale or distribution; or

(c) In this state, he:

1. Prepares, or

2. Publishes, or

3. Prints, or

4. Exhibits, or

5. Distributes, or

6. Offers to distribute, or

7. Has in his possession with intent to distribute, exhibit or offer to distribute, any obscene matter.

(2) Distribution of obscene matter is a Class B misdemeanor unless the defendant has in his possession

more than one unit of material coming within the provisions of this chapter, in which case it shall be a Class A misdemeanor.

HISTORY: 1974 H 232, § 266, eff. 1-1-75

COMMENTARY (1974)

This section prohibits the commercial exploitation of pornography. Knowledge of the content and character of the material or performance is an essential element and must be proven. *Smith v. California*, 361 U.S. 147 (1960). The statute includes those situations in which obscene material is sent or caused to be sent into this state or brought, or caused to be brought into this state for sale or distribution. This section also applies to one who prepares, publishes, prints, exhibits, distributes, offers to distribute or has in his possession with intent to distribute, exhibit or offer to distribute any obscene material.

Distribution of obscene matter is a Class B misdemeanor unless the defendant has in his possession more than one unit of obscene material, in which case the offense becomes a Class A misdemeanor.

Relationship to Pre-existing Law: Kentucky's previous principal obscenity statute, KRS 436.101, prohibited the sale or distribution of obscene matter, the sale or distribution of obscene matter to minors, the employment of minors in the sale or distribution of obscene matter, the advertising or promotion of the sale or distribution of obscene matter, and "tie-in" sales. It also provided for special jury verdicts and destruction of obscene matter by court order after conviction. The new statute will make little change in the substantive offense defined in prior Kentucky law. Previous Kentucky law required knowledge of the obscenity as do the new statutes. The sale or distribution of obscene matter to minors will be treated in KRS 531.030. The employment of a minor in the sale or distribution of obscene matter would be prohibited by KRS 530.040.

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 25.11(2)

Censorship of motion pictures. 4 Am Jur2d, Amusements and Exhibitions § 21

Obscenity in general. 50 Am Jur2d, Lewdness, Indecency, and Obscenity § 3 to 15

Particular activities as obscene. 50 Am Jur2d, Lewdness, Indecency, and Obscenity § 16 to 29

Mailing of obscene material. 62 Am Jur2d, Post Office § 98 to 104

Exclusion from evidence of parts of a publication or mail matter, other than those charged to be obscene, or oral testimony relating to purpose or effect of publication as a whole. 69 ALR 644

Publications of a scientific, educational or instructive character regarding sex relations as within statutes relating to obscene or immoral publications. 76 ALR 1099

Entrapment to commit offense against obscenity laws. 77 ALR2d 792

Criminal offense predicated upon indecent exposure. 94 ALR2d 1353

Modern concept of obscenity. 5 ALR3d 1158

Validity of procedures designed to protect the public against obscenity. 5 ALR3d 1214

Validity and construction of federal statutes (18 USC § 1463, 1718) which declare nonmailable matter, otherwise mailable, because of what appears upon envelope, outside cover, wrapper, or on postal card. 11 ALR3d 1276

Operation of nude-model photographic studio as offense. 48 ALR3d 1313

Topless or bottomless dancing or similar conduct as offense. 49 ALR3d 1084

Exhibition of obscene motion pictures as nuisance. 50 ALR3d 969

Validity and construction of statute or ordinances forbidding treatment in health clubs or massage salons by persons of the opposite sex. 51 ALR3d 936

Pornoshops or similar places disseminating obscene materials as nuisance. 58 ALR3d 1134

Validity, construction, and application of provisions of Postal Reorganization Act of 1970 (18 USC § 1735 to 1737; 39 USC § 3010, 3011) prohibiting mailing of sexually oriented advertisements to persons who have notified postal service they wish to receive no such material. 15 ALR Fed 488

531.030 Distribution of obscene matter to minors

(1) A person is guilty of distribution of obscene material to minors when, knowing a person to be a minor, or having possession of such facts that he should reasonably know that such person is a minor, and with knowledge of the content and character of the material he knowingly:

(a) Sends or causes to be sent; or

(b) Exhibits; or

(c) Distributes, or offers to distribute, obscene material to a minor.

(2) Distribution of obscene materials to minors is a Class A misdemeanor unless the defendant has previously been convicted of violation of this section or of KRS 531.020, in which case it shall be a Class D felony.

HISTORY: 1974 H 232, § 267, eff. 1-1-75

COMMENTARY (1974)

KRS 531.030 prohibits distributing material harmful to minors. The acts which constitute distributing are the same as those prohibited in KRS 531.020, but the standard with reference to which any such material or performance is to be judged is changed. This standard is whether the material or performance is harmful to minors. The power of a state to establish more stringent standards for the distribution of obscenity to minors has been clearly established by the United States Supreme Court in *Ginsburg v. New York*, 390 U.S. 629 (1968). Because a material or performance may be constitutionally protected in reference to adults but obscene in reference to children, the key factor is the standard by which the material or performance is judged rather than the content or character of the material or performance.

It should be noted that KRS 531.030 does not require that the promotion be for pecuniary gain. The purpose of KRS 531.030 is to protect children against the potentially harmful effect of pornographic material. This purpose is broader than merely controlling the commercial exploitation of pornography and, thus, pecuniary gain is not an essential element under KRS 531.030.

Distribution of obscene material to minors is a Class A misdemeanor unless the defendant has previously been convicted of a violation of this section or of KRS 531.020, in which case it shall be a Class D felony.

Relationship to Pre-existing Law: KRS 531.030 makes little substantive change in prior Kentucky law. KRS 436.101(3) prohibited knowingly selling or distributing obscene matter to a minor. The new statute seeks to make explicit the more stringent standard by which the content and character of such material or performance is to be judged.

KRS 436.540 declared a policy to restrain the publication, sale and distribution to minors of comic books devoted to crime, terror, physical torture, brutality or illicit sex because the legislature has determined that such publications are a contributing factor to juvenile crime and impair the ethical and moral development of youth. KRS 436.550 made it a crime to publish or distribute such comic books. KRS 436.560 prohibited the sale of such comic books to a minor, established the presumption that the display of any such comic books in any newsstand or store is with the intention to violate the prohibition against sale, and established the presumption that the possession of six or more identical, prohibited comic books is a violation of the prohibition against sale. KRS 436.570 provided for injunctive action against any such publication, distribution or sale.

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 25.11(5)

Applicability of criminal statutes relating to offenses against children of a specified age with respect to a child who is past the anniversary date of such age. 73 ALR2d 874

531.040 Using minors to distribute obscene material

(1) A person is guilty of using minors to distribute obscene material when knowing a person to be a minor, or having possession of such facts that he should reasonably know such person is a minor, and knowing of the content and character of the material, he knowingly:

- (a) Hires; or
- (b) Employs; or
- (c) Uses,

a minor to do or assist in doing any of the acts prohibited by KRS 531.020.

(2) Using minors to distribute obscene material is a Class A misdemeanor unless the defendant has previously been convicted of violation of this section or KRS 531.030, in which case it shall be a Class D felony.

HISTORY: 1974 H 232, § 268, eff. 1-1-75

COMMENTARY (1974)

KRS 531.040 requires the defendant to have knowledge that the person he hires, employs or uses to distribute obscene material is a minor and to know that the content and character of the material distributed is obscene. This section did not change prior Kentucky law.

Using minors to distribute obscene material is a Class A misdemeanor unless the defendant has previously been convicted of violating this section or KRS 531.030, in which case it shall be a Class D felony.

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 25.11(2)

531.050 Advertising obscene material

(1) A person is guilty of advertising obscene material when, having knowledge of its content and character thereof, he writes or creates advertising or solicits anyone to publish such advertising or otherwise promotes the sale or distribution of obscene matter.

(2) Advertising obscene material is a Class B misdemeanor.

HISTORY: 1974 H 232, § 269, eff. 1-1-75

COMMENTARY (1974)

KRS 531.050 and 531.060 are designed to prohibit the commercial exploitation of obscenity. KRS 531.050 prohibits a person from writing or creating advertising or soliciting anyone to publish such advertising or otherwise promoting the sale or distribution of obscene matter. Violation of the section is a Class B misdemeanor.

KRS 531.060 is designed to prohibit threats or coercion from being used upon another to force them to sell obscene material or to keep them from returning the obscene matter to the sender.

Promoting the sale of obscenity is a Class B misdemeanor for the first offense, a Class A misdemeanor for the second offense and a Class D felony for each subsequent offense.

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 25.11(3)

531.060 Promoting sale of obscenity

(1) A person is guilty of promoting sale of obscenity when he knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any matter reasonably believed by the purchaser or consignee to be obscene, or he denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept such matter, or by reason of the return of such matter.

(2) Promoting sale of obscenity is a Class B misdemeanor for the first offense; a Class A misdemeanor for the second offense; and a Class D felony for each subsequent offense.

HISTORY: 1974 H 232, § 270, eff. 1-1-75

COMMENTARY (1974)

Note: See Commentary under 531.050.

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 25.11(4)

Pornoshops or similar places disseminating obscene materials as nuisance. 58 ALR3d 1134

531.070 Exemptions

The prohibitions and penalties imposed in this chapter shall not extend to persons having a bona fide scientific, educational, governmental, or other similar justification for conduct which would, except for such justification, be criminal under this chapter.

HISTORY: 1974 H 232, § 271, eff. 1-1-75

COMMENTARY (1974)

The new statute sets forth an exemption for conduct which would otherwise be criminal under the Code. Distribution of material otherwise obscene to institutions or persons for scientific, educational or governmental purposes is justified conduct and does not expose the distributor to criminal sanctions. This exemption is designed to permit legitimate study of pornography for scholarly or scientific purposes. It is recognized by all modern codes. Prior Kentucky law recognized such an exception to KRS 436.101(7) and KRS 436.120.

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 25.11(1)

531.080 Special verdict

(1) The jury, or the court, if a jury trial is waived, shall render a general verdict, and shall also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the (title or description of matter) to be obscene," or, "We find the (title or description of matter) not to be obscene," as they may find each item is or is not obscene.

(2) Whenever a person is tried for distribution of matter portraying a sexual performance by a minor, the jury, or the court, if a jury trial is waived, shall render a special verdict as to whether the matter named in the charge portrays a sexual performance by a minor. The

special verdict or findings on the issue of whether or not the matter portrays a sexual performance by a minor may be: "We find the (title or description of matter) to portray a sexual performance by a minor," or, "We find the (title or description of matter) not to portray a sexual performance by a minor," as they may find each item to portray or not to portray a sexual performance by a minor.

(3) Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the attorney general, Commonwealth's attorney, county attorney, city attorney or their authorized assistants, or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

HISTORY: 1978 H 155, § 8, eff. 6-17-78
1974 H 232, § 272

COMMENTARY (1974)

This statute requires that a general and a special verdict be given in a case involving obscene material. The jury, or the court, if a jury trial is waived, shall render a general verdict. There shall also be given a special verdict as to whether the matter named in the charge is obscene. This statute provides a form as to how the special verdict may be worded.

Subsection (2) is derived from KRS 436.101(9). This subsection gives the court authority to order the destruction of pornographic material which is in its possession or under its control and upon which the final conviction of the actor is based. It is intended that this destruction provision will give the prosecution an effective, practical weapon to combat the dissemination of obscene material. KRS 531.080(2) is merely a restatement of prior Kentucky law.

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 25.11(6)(7)

SEXUAL EXPLOITATION OF MINORS

531.300 Definitions for KRS 531.080 and 531.310 to 531.370

As used in KRS 531.080 and 531.310 to 531.370:

(1) "Distribute" means to transfer possession of, whether with or without consideration.

(2) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines, or materials.

(3) "Obscene" means:

(a) To the average person, applying contemporary community standards, the predominant appeal of the matter, taken as a whole, is to prurient interest in sexual conduct; and

(b) The matter depicts or describes the sexual conduct by a minor in a patently offensive way; and

(c) The matter, taken as a whole, lacks serious liter-

ary, artistic, political, or scientific value.

(4) "Sexual conduct by a minor" means:

(a) Acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse, or deviant sexual intercourse, actual or simulated; or

(b) Physical contact with, or obscene exhibition of the genitals; or

(c) Flagellation or excretion for the purpose of sexual stimulation or gratification; or

(d) The exposure, in an obscene manner, of the unclothed or apparently unclothed human male or female genitals, pubic area or buttocks, or the female breast, whether or not subsequently obscured by a mark placed thereon, or otherwise altered, in any resulting motion picture, photograph or other visual representation, exclusive of exposure portrayed in matter of a private, family nature not intended for distribution outside the family.

(5) "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.

(6) "Sexual performance" means any performance or part thereof which includes sexual conduct by a minor.

(7) "Promote" means to prepare, publish, print, procure or manufacture, or to offer or agree to do the same.

HISTORY: 1978 H 155, § 2, eff. 6-17-78

531.310 Use of a minor in a sexual performance

(1) A person is guilty of the use of a minor in a sexual performance if he employs, consents to, authorizes or induces a minor to engage in a sexual performance.

(2) Use of a minor in a sexual performance is:

(a) A Class D felony if the minor so used is less than eighteen (18) years old at the time of the offense;

(b) A Class C felony if the minor so used is less than sixteen (16) years old at the time of the offense;

(c) A Class B felony if the minor so used incurs physical injury thereby.

HISTORY: 1978 H 155, § 3, eff. 6-17-78

531.320 Promoting a sexual performance by a minor

(1) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a minor.

(2) Promoting a sexual performance by a minor is:

(a) A Class D felony if the minor involved in the sexual performance is less than eighteen (18) years old at the time of the offense;

(b) A Class C felony if the minor involved in the sexual performance is less than sixteen (16) years old at the time of the offense;

(c) A Class B felony if the minor involved in the sexual performance incurs physical injury thereby.

HISTORY: 1978 H 155, § 4, eff. 6-17-78

531.330 Presumption as to minority

(1) For purposes of KRS 529.030, 530.070, 531.080 and 531.300 to 531.370, any person who appears to be

under the age of eighteen (18), or under the age of sixteen (16), shall be presumed to be under the age of eighteen (18), or under the age of sixteen (16), as the case may be.

(2) In any prosecution under KRS 529.030, 530.070, 531.080 and 531.300 to 531.370 the defendant may prove in exculpation that he in good faith reasonably believed that the person involved in the performance was not a minor.

(3) The presumption raised in subsection (1) of this section may be rebutted by any competent evidence.

HISTORY: 1978 H 155, § 5, eff. 6-17-78

531.340 Distribution of matter portraying a sexual performance by a minor

(1) A person is guilty of distribution of matter portraying a sexual performance by a minor when, having knowledge of its content and character, he:

(a) Sends or causes to be sent into this state for sale or distribution; or

(b) Brings or causes to be brought into this state for sale or distribution; or

(c) In this state, he:

1. Exhibits for profit or gain; or

2. Distributes; or

3. Offers to distribute; or

4. Has in his possession with intent to distribute, exhibit for profit or gain or offer to distribute, any matter portraying a sexual performance by a minor.

(2) Any person who has in his possession more than one (1) unit of material coming within the provision of KRS 531.300(2) shall be rebuttably presumed to have such material in his possession with the intent to distribute it.

(3) Distribution of matter portraying a sexual performance by a minor is a Class A misdemeanor unless the defendant has in his possession more than one (1) unit of material coming within the provisions of KRS 531.300, in which case it shall be a Class D felony.

HISTORY: 1978 H 155, § 6, eff. 6-17-78

531.350 Promoting sale of material portraying a sexual performance by a minor

(1) A person is guilty of promoting sale of material portraying a sexual performance by a minor when he knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any matter

portraying a sexual performance by a minor, or he denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept such matter, or by reason of the return of such matter.

(2) Promoting sale of matter portraying a sexual performance by a minor is a Class A misdemeanor for the first offense, a Class D felony for the second offense, and a Class C felony for each subsequent offense.

HISTORY: 1978 H 155, § 7, eff. 6-17-78

531.360 Advertising material portraying a sexual performance by a minor

(1) A person is guilty of advertising material portraying a sexual performance by a minor when, having knowledge of its content and character thereof, he writes or creates advertising or solicits anyone to publish such advertising or otherwise promotes the sale or distribution of matter portraying a sexual performance by a minor.

(2) Advertising material portraying a sexual performance by a minor is a Class A misdemeanor.

HISTORY: 1978 H 155, § 9, eff. 6-17-78

531.370 Using minors to distribute material portraying a sexual performance by a minor

(1) A person is guilty of using minors to distribute material portraying a sexual performance by a minor when knowing a person to be a minor, or having possession of such facts that he should reasonably know such person is a minor, and knowing of the content and character of the material, he knowingly:

(a) Hires; or

(b) Employs; or

(c) Uses, a minor to do or assist in doing any of the acts prohibited by KRS 531.340.

(2) Using minors to distribute material portraying a sexual performance by a minor is a Class D felony unless the defendant has previously been convicted of violation of this section or KRS 531.030, in which case it shall be a Class C felony.

HISTORY: 1978 H 155, § 10, eff. 6-17-78

Sandy Hobbs
Feb 4, 1985

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MENTARY (1974)

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Validity, construction, and application of provisions of
Postal Reorganization Act of 1970 (18 USC § 1735 to 1737; 39
USC § 3010, 3011) prohibiting mailing of sexually oriented ad-
vertisements to persons who have notified postal service they
wish to receive no such material. 15 ALR Fed 488

531.030 Distribution of obscene matter to minors

(1) A person is guilty of distribution of obscene
material to minors when, knowing a person to be a mi-
nor, or having possession of such facts that he should
reasonably know that such person is a minor, and with
knowledge of the content and character of the material,
he knowingly:

(a) Sends or causes to be sent; or

(b) Exhibits; or

(c) Distributes, or offers to distribute, obscene
material to a minor.

(2) Distribution of obscene materials to minors is a
Class A misdemeanor unless the defendant has previ-
ously been convicted of violation of this section or of
KRS 531.020, in which case it shall be a Class D felony.

HISTORY: 1974 H 232, § 267, eff. 1-1-75

COMMENTARY (1974)

KRS 531.030 prohibits distributing material harmful to mi-
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those prohibited in KRS 531.020, but the standard with refer-
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531.030

Kentucky Penal Code

780

781

more than one unit of material coming within the provisions of this chapter, in which case it shall be a Class A misdemeanor.

HISTORY: 1974 H 232, § 266, eff. 1-1-75

COMMENTARY (197-4)

This section prohibits the commercial exploitation of pornography. Knowledge of the content and character of the material or performance is an essential element and must be proven. *Smith v. California*, 361 U.S. 147 (1960). The statute includes those situations in which obscene material is sent or caused to be sent into this state or brought, or caused to be brought into this state for sale or distribution. This section also applies to one who prepares, publishes, prints, exhibits, distributes, offers to distribute or has in his possession with intent to distribute, exhibit or offer to distribute any obscene material.

Distribution of obscene matter is a Class B misdemeanor unless the defendant has in his possession more than one unit of obscene material, in which case the offense becomes a Class A misdemeanor.

Relationship to Pre-existing Law: Kentucky's previous principal obscenity statute, KRS 436.101, prohibited the sale or distribution of obscene matter, the sale or distribution of obscene matter to minors, the employment of minors in the sale or distribution of obscene matter, the advertising or promotion of the sale or distribution of obscene matter, and "tie-in" sales. It also provided for special jury verdicts and destruction of obscene matter by court order after conviction. The new statute will make little change in the substantive offense defined in prior Kentucky law. Previous Kentucky law required knowledge of the obscenity as do the new statutes. The sale or distribution of obscene matter to minors will be treated in KRS 531.030. The employment of a minor in the sale or distribution of obscene matter would be prohibited by KRS 530.040.

CROSS REFERENCES

See Brickey, Kentucky Criminal Law § 25.11(2)

Censorship of motion pictures. 4 Am Jur2d, Amusements and Exhibitions § 21

Obscenity in general. 50 Am Jur2d, Lewdness, Indecency, and Obscenity § 3 to 15

Particular activities as obscene. 50 Am Jur2d, Lewdness, Indecency, and Obscenity § 16 to 29

Mailing of obscene material. 62 Am Jur2d, Post Office § 98 to 104

Exclusion from evidence of parts of a publication or mail matter, other than those charged to be obscene, or oral testimony relating to purpose or effect of publication as a whole. 69 ALR 644

Publications of a scientific, educational or instructive character regarding sex relations as within statutes relating to obscene or immoral publications. 76 ALR 1099

Entrapment to commit offense against obscenity laws. 77 ALR2d 792

Criminal offense predicated upon indecent exposure. 94 ALR2d 1353

Modern concept of obscenity. 5 ALR3d 1158

Validity of procedures designed to protect the public against obscenity. 5 ALR3d 1214

Validity and construction of federal statutes (18 USC § 1463, 1718) which declare nonmailable matter, otherwise mailable, because of what appears upon envelope, outside cover, wrapper, or on postal card. 11 ALR3d 1276

Operation of nude-model photographic studio as offense. 48 ALR3d 1313

Topless or bottomless dancing or similar conduct as offense. 49 ALR3d 1084

Exhibition of obscene motion pictures as nuisance. 50 ALR3d 969

Validity and construction of statute or ordinances forbidding treatment in health clubs or massage salons by persons of the opposite sex. 51 ALR3d 936

Pornoshops or similar places disseminating obscene materials as nuisance. 58 ALR3d 1134

Validity, construction, and application of provisions of Postal Reorganization Act of 1970 (18 USC § 1735 to 1737; 39 USC § 3010, 3011) prohibiting mailing of sexually oriented advertisements to persons who have notified postal service they wish to receive no such material. 15 ALR Fed 488

531.030 Distribution of obscene matter to minors

(1) A person is guilty of distribution of obscene material to minors when, knowing a person to be a minor, or having possession of such facts that he should reasonably know that such person is a minor, and with knowledge of the content and character of the material, he knowingly:

(a) Sends or causes to be sent; or

(b) Exhibits; or

(c) Distributes, or offers to distribute, obscene material to a minor.

(2) Distribution of obscene materials to minors is a Class A misdemeanor unless the defendant has previously been convicted of violation of this section or of KRS 531.020, in which case it shall be a Class D felony.

HISTORY: 1974 H 232, § 267, eff. 1-1-75

COMMENTARY (1974)

KRS 531.030 prohibits distributing material harmful to minors. The acts which constitute distributing are the same as those prohibited in KRS 531.020, but the standard with reference to which any such material or performance is to be judged is changed. This standard is whether the material or performance is harmful to minors. The power of a state to establish more stringent standards for the distribution of obscenity to minors has been clearly established by the United States Supreme Court in *Ginsburg v. New York*, 390 U.S. 629 (1968). Because a material or performance may be constitutionally protected in reference to adults but obscene in reference to children, the key factor is the standard by which the material or performance is judged rather than the content or character of the material or performance.

It should be noted that KRS 531.030 does not require that the promotion be for pecuniary gain. The purpose of KRS 531.030 is to protect children against the potentially harmful effect of pornographic material. This purpose is broader than merely controlling the commercial exploitation of pornography and, thus, pecuniary gain is not an essential element under KRS 531.030.

Distribution of obscene material to minors is a Class A misdemeanor unless the defendant has previously been convicted of a violation of this section or of KRS 531.020, in which case it shall be a Class D felony.

Relationship to Pre-existing Law: KRS 531.030 makes little substantive change in prior Kentucky law. KRS 436.101(3) prohibited knowingly selling or distributing obscene matter to a minor. The new statute seeks to make explicit the more stringent standard by which the content and character of such material or performance is to be judged.

KRS 436.540 declared a policy to restrain the publication, sale and distribution to minors of comic books devoted to crime, terror, physical torture, brutality or illicit sex because the legislature has determined that such publications are a contributing factor to juvenile crime and impair the ethical and moral development of youth. KRS 436.550 made it a crime to publish or distribute such comic books. KRS 436.560 prohibited the sale of such comic books to a minor, established the presumption that the display of any such comic books in any newsstand or store is with the intention to violate the prohibition against sale, and established the presumption that the possession of six or more identical, prohibited comic books is a violation of the prohibition against sale. KRS 436.570 provided for injunctive action against any such publication, distribution or sale.

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