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WOMEN'S HEALTH CTR. OF WEST CTY., INC. v. WEBSTER

March 21, 1988

Women's Health Center Of West County, Inc., et al., Plaintiffs,
v.
William L. Webster, et al., Defendants

The opinion of the court was delivered by: GUNN, JR.

MEMORANDUM OPINION

THE HONORABLE GEORGE F. GUNN, JR., Judge

Plaintiffs bring the present action for declaratory and injunctive relief in which they challenge the constitutionality of Section 188.080, R.S.Mo. (1986). Section 188.080 provides in pertinent part that a physician who performs an abortion and who does not have surgical privileges at a hospital which offers obstetrical or gynecological care is guilty of a class B felony. Plaintiffs contend that Section 188.080 impermissibly burdens a woman's right to privacy guaranteed under the first, fourth, fifth, ninth and fourteenth amendments of the United States Constitution, denies them their due process and equal protection rights guaranteed under the fourteenth amendment of the United States Constitution, and is unconstitutionally vague.

A hearing on the issues was held by the Court. Based on the pleadings, evidence and the law presented to it, the Court now declares Section 188.080 constitutional and enters judgment in favor of defendants and against plaintiffs.

The Court makes the following findings of fact and conclusions of law as required by Rule 52, Fed.R.Civ.P.

FINDINGS OF FACT

Plaintiffs Women's Health Center of West County, Inc., Women's Health Center of Cape Girardeau, Inc. and Women's Health Center of St. Peters, Inc. (collectively "Women's Health Centers") are Missouri corporations in good standing with their principal places of business in St. Louis County, Cape Girardeau and St. Peters. The centers offer gynecological medical services to the public, including first and second trimester abortions. Plaintiff Bolivar M. Escobedo, M.D. ("Escobedo"), a resident of St. Louis County, is president of the Women's Health Centers and is licensed to practice medicine in the State of Missouri. He specializes in obstetrical and gynecological care, including abortions. Plaintiff C.J.E., also a resident of St. Louis County, was, at the time of filing suit, a twenty-two year old unmarried pregnant woman who wanted to obtain an abortion.

Defendants are the State of Missouri, William L. Webster, the state's Attorney General, and George "Buzz" R. Westfall, the Prosecuting Attorney for St. Louis County, Missouri. Defendants Webster and Westfall are charged with the duty of enforcing the laws of Missouri, including Section 188.080. Defendant Westfall has threatened to criminally prosecute Escobedo if he performs an abortion without obtaining surgical privileges at a hospital which offers obstetrical or gynecological care.

Section 188.080 was passed by the Missouri General Assembly on April 23, 1986, signed into law by Governor John Ashcroft on June 26, 1986, and became effective on August 13, 1986. It provides:

Notwithstanding any other penalty provision in this chapter, any person who is not a licensed physician as defined in section 188.015 who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 188.015, is guilty of a class B felony, and, upon conviction, shall be punished as

provided by law. Any physician performing an abortion who does not have surgical privileges at a hospital which offers obstetrical or gynecological care shall be guilty of a class B felony, and, upon conviction, shall be punished as provided by law.

Plaintiffs' only challenge is to the constitutionality of the second sentence of Section 188.080, which requires physicians who perform abortions to have surgical privileges at a hospital that offers obstetrical or gynecological care.

Escobedo, who is forty-nine years old, was born in Lima, Peru and became a naturalized United States citizen in March of 1985. He was educated in Lima's San Marcos University, where he received his medical degree. Shortly thereafter, he came to the United States and did his general internship at Meadowbrook Hospital in New York. He completed his first year of residency at Pontiac General Hospital in Pontiac, Michigan, and his second and third years of residency at St. Louis University in St. Louis, Missouri, where he specialized in obstetrics and gynecology. He has been licensed to practice medicine in the state of Missouri since 1972.

Escobedo presently maintains staff and surgical privileges at two hospitals in Lima, Peru. He has, in the past, had temporary staff and surgical privileges at the following hospitals in Missouri: St. Louis City Hospital, St. Mary's Hospital, Firmin-Desloge Hospital and DePaul Community Hospital. He was previously on staff at DePaul Community Hospital, Lindell Hospital and Midwest General Hospital, where he also maintained surgical privileges as an obstetrician-gynecologist. He voluntarily resigned from his staff positions at DePaul Community Hospital and Lindell Hospital. Midwest General Hospital has subsequently been sold and has closed its surgical unit.

As a result of the enactment of Section 188.080, Escobedo has recently submitted applications for staff and surgical privileges at the following hospitals in Missouri: Barnes Hospital, Jewish Hospital, St. John's Mercy Medical Center, Missouri Baptist Hospital, Firmin-Desloge Hospital, Wentzville Community Hospital and Lindell Hospital. Wentzville Community Hospital and Lindell Hospital have rejected his applications, and those at the other hospitals are pending.

Escobedo is the only physician licensed to practice medicine in the state of Missouri who wants to perform abortions and who has yet to obtain surgical privileges at a hospital offering obstetrical or gynecological care. Since filing the present action in January of 1987, he has refrained from performing abortions by reason of Section 188.080. Although he continues to provide other gynecological services, he refers prospective patients who want to obtain abortions to other physicians, including those on staff at each of the Women's Health Centers who do have hospital surgical privileges. There is no evidence that any prospective patient has been deterred from obtaining an abortion or turned away for any reason.

Escobedo is not lacking in experience. In the fourteen years immediately preceding the filing of this action, he performed over 50,000 abortions. Prior to each abortion, he requires the patient to review with him and to sign an "Operative Permit, Abortion Permit, or Consent for Surgery" ("Operative Permit"). In the Operative Permit, he informs the patient that an abortion is "a surgical procedure" which "carries its own risks." These risks include such complications as "anesthetic reaction, hemorrhage, infection [and] uterine perforation." In the event there is a complication, he informs the patient that hospitalization may be necessary and requires them to consent to the payment of all hospital charges.

Escobedo estimates that of the 50,000 abortions he has performed, only ten resulted in complications that required hospitalization. However, the Court finds such an estimate to be an unreliable indicator of the percentage of abortions which result in serious complications. Escobedo admits that over sixty percent of his abortion patients live between one hundred and two hundred miles from St. Louis County and that he could not be certain whether any of these patients experienced complications.

C.J.E. is employed by Women's Health Center of West County, Inc., as a medical assistant and counselor. Although she has received some nurse's training, she is not a registered nurse. Nevertheless, as an employee of Women's Health Center of West County, Inc., she assists physicians who perform abortions in both the operating room and the recovery room. She also counsels patients who obtain an abortion and ...

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