

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60047
Summary Calendar

IN RE: GRAND JURY SUBPOENA DUCES
TECUM ISSUED ON APRIL 22,
1991 TO RECORDS CUSTODIAN,

VIVID VIDEO, INC. and
VIVID VIDEO DIRECT,

Appellants.

Appeal from the United States District Court
For the Northern District of Mississippi
(WC-91-80)

(September 15, 1994)

Before POLITZ, Chief Judge, DUHÉ and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:*

Vivid Video, Inc. and Vivid Video Direct (collectively Vivid Video) appeal the denial of a motion to alter or amend a judgment requiring their payment of \$26,000 in fines for contemptuous failure to comply with a subpoena duces tecum. We affirm.

Background

A subpoena duces tecum was issued by a grand jury in the

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Northern District of Mississippi for certain business records of Vivid Video, a California-based distributor of sexually explicit materials. Vivid Video moved to quash the subpoena as burdensome. After a hearing the district court modified the subpoena and ordered compliance by June 17, 1991. Vivid Video refused to comply, resulting in a contempt hearing on June 28, 1991 in which Vivid Video was found in contempt and each entity was ordered to pay \$1000 per day for each day thereafter in which it failed to comply with the order enforcing the modified subpoena. The district court declined to stay its order or the accumulation of the fine pending appeal.

Vivid Video appealed the contempt order to this court and sought a stay of the daily penalty for failure of compliance with the subpoena duces tecum. We denied the stay. Vivid Video promptly complied with the subpoena and subsequently dismissed its appeal.

The government successfully moved for judgment for the 13 days of noncompliance, a total of \$26,000 plus interest and costs. Vivid Video sought a modification of the judgment under Fed.R.Civ.P. 59(e), contending that it had challenged the contempt order in good faith and that the trial court had erred by failing to consider the chilling effect of its order on Vivid Video's first amendment rights. The district court denied the Rule 59(e) motion and Vivid Video timely appealed.

Analysis

Vivid Video insists that it refused to comply with the

contempt order solely to obtain appellate review of the sanctions. In assessing the fine, Vivid Video contends, the district court did not consider their good faith. In **United States v. United Mine Workers**,¹ the Supreme Court established the criteria for civil contempt sanctions: the harm from noncompliance, the probable effectiveness of the sanction, the financial resources of the contemnor and the burden the sanctions may impose, and the willfulness of the contemnor in disregarding the court's order.²

The district court based the per diem fine on factors outlined by the Supreme Court, expressly noting the grand jury's need for the documents, the size and fiscal health of Vivid Video, and its deliberateness in declining to obey the contempt order. The district court made the consequence of continued noncompliance very clear. The suggestion that the contempt order was entered merely to enable an appeal and not to impose actual, coercive penalties for noncompliance is not supported by the jurisprudence or the instant record. Vivid Video offers no authority for the proposition that its admittedly deliberate defiance of a court order should be exempt from sanctions because its refusal to obey a court order was well-intentioned.

Vivid Video contends, in passing, that the per diem rate is excessive. Nothing is offered to show error in the district court's uncontradicted findings of the corporations' financial

¹330 U.S. 258 (1947).

²See **UMW; Lamar Fin. Corp. v. Adams**, 918 F.2d 564 (5th Cir. 1990).

standings. The trial court's finding of contempt and assessment of the amount of sanctions are consistent with the teachings of **United Mine Workers**.

Vivid Video would have us vacate the sanctions because the contempt order somehow chilled the exercise of its protected first amendment rights. Our colleagues in the Fourth Circuit cautioned that courts should not "rubber-stamp every subpoena of business records of a commercial enterprise that distributes material in a presumptively protected medium."³ Absent some scrutiny, prosecutors might pursue fishing expeditions with no purpose other than harassment of unpopular but legal businesses. Having noted this caution, our colleagues upheld a subpoena duces tecum for business records against an identical first amendment challenge, finding that the district court there, as in the case before us, had tailored the subpoena to include only documents relevant to the grand jury's tasks.

The Supreme Court's decision in **University of Pennsylvania v. EEOC**⁴ is instructive of the boundaries of subpoena power in light of the first amendment. The Court rejected the call for heightened scrutiny of a subpoena duces tecum which purportedly chilled first amendment academic freedom. Upon a demonstration of bad faith, protection might be accorded, but mere speculation about a chilling effect was not sufficient to defeat a validly issued subpoena duces

³**In Re Grand Jury 87-3 Subpoena Duces Tecum**, 955 F.2d 229 (4th Cir. 1992).

⁴493 U.S. 182 (1990).

tecum.

In the case at bar we find neither evidence nor citation of authority supportive of the proposition that the business records subpoenaed are deserving of first amendment protection. Mere allegations of bad faith or speculation of chilling consequence of a subpoena do not suffice.

The judgment appealed is AFFIRMED.