IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,	)	
	)	
Plaintiff-Respondent,	)	Trial Court
	)	No. B58-052
v.	)	
	)	Appellate Court
MARK JOHN TUSEK,	)	No. 19478
	)	
Defendant-Appellant.	)	

AMICUS CURIAE'S BRIEF

Appeal from the Judgment of the District Court
for Lane County

Honorable Winfrid K. Liepe, Judge

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STATEMENT OF THE CASE

Appellant has requested this Court to declare ORS 163.455 (accosting for deviate purposes) unconstitutional on its face in violation of either the free speech or equal protection clauses of the United States or Oregon Constitutions.

Respondent, as represented by the Attorney General, for all practical purposes, has admitted to the facial unconstitutionality of the statute, but urges the Court to construe it so as to apply only to the public solicitation of deviate sexual intercourse intended to be performed in a public place.

No facts are before this Court because the assignment of error pertains to the overruling of a demurrer, which, of course, challenged the constitutionality of the statute on its face.

ARGUMENT

Introduction

ORS 163.455 prohibits solicitations which are made in a public place when they propose the commission of "deviate sexual intercourse," regardless of the ultimate locus of the proposed conduct. ORS 163.305(1) defines with extreme clarity the types of sexual conduct deemed to be "deviate sexual intercourse." As a result of this clear definition, no claim has been made that the statute may be void for vagueness.

The constitutional issues raised by Appellant and addressed by Respondent involve the doctrines of overbreadth and equal protection. Rather than dwelling too heavily on the arguments of the parties, Amicus Curiae, National Committee for Sexual Civil Liberties,

hopes to assist the Court in its constitutional and statutory analysis by sharing some perspectives and concerns which may have been inadvertently overlooked by Appellant and Respondent.

A survey and analysis of Oregon's regulation of non-commercial sexual solicitations between adults

Appellant and Respondent have focused exclusively on two Oregon statutes. ORS 163.455 (accosting for deviate purposes) reads as follows:

> (1) A person commits the crime of accosting for deviate purposes if while in a public place he invites or requests another person to engage in deviate sexual intercrouse.
>
> (2) Accosting for deviate purposes is a Class C misdemeanor.

ORS 163.305(1) defnies "deviate sexual intercourse" as being limited to oral and anal sexual conduct.

It is in reference to these two statutes that the parties argue which course of action this Court should follow. However, there are other statutes which should be considered before one moves on to the ultimate resolution of the constitutional issues. ORS 161.435 prohibits criminal solicitation. In relevant part, it reads:

> (1) A person commits the crime of solicitation if with the intent of causing another to engage in specific conduct constituting a crime punishable as a felony or as a Class A misdemeanor . . . he commands or solicits such person to engage in that conduct.
>
> (2) Solicitation is a: . . . (e) Class B misdemeanor if the offense solicited is a Class A misdemeanor.

Obviously the Legislative purpose in enacting ORS 161.435 was to prohibit the solicitation of felonies and certain high grade misdemeanors.

Public indecency is punishable as a Class A misdemeanor. Therefore, solicitation of public indecency is prohibited by the terms of ORS 161.435. ORS 163.465 (public indecency) states:

> (1) A person commits the crime of public indecency if while in, or in view of, a public place he performs:
>
> (a) An act of sexual intercourse; or
>
> (b) An act of deviate sexual intercourse; or
>
> (c) An act of exposing his genitals with the intent of arousing the sexual desire of himself or another.
>
> (2) Public indecency is a Class A misdemeanor.

Since solicitation of public sexual conduct is prohibited by ORS 161.435 and so punishable as a Class B misdemeanor, what Legislative intent can rationally be ascribed to ORS 163.455 (accosting for deviate purposes)?

Four observations about ORS 163.455 are relevant here: (1) this statute is limited to public solicitations; (2) it is limited to "deviate sexual intercourse;" (3) there is no requirement that the proposed conduct be criminal or in public; and (4) such solicitations are only punishable as Class C misdemeanors, a lesser punishment than the criminal solicitation statut

With all of these statutes and observations in mind, Amicus Curiae will now turn to the constitutional issues which are involved and will comment on the positions of both Appellant and Respondent.

This case does not involve a vague statute

Both Appellant and Respondent cite cases from jurisdictions other than Oregon which involved constitutional challenges to sexual solicitation statutes, e.g., Cherry v. State, 306 A.2d 634 (Md. St. Sp. App., 1973); Riley v. United States, 298 A.2d 228 (D.C.Ct.App., 1973); District of Columbia v. Garcia, 335 A.2d 217 (D.C.Ct.App., 1975); Pederson v. City of Richmond, 254 S.E.2d 95 (Vir.Supr.Ct., 1979); Pryor v. Municipal Court, 25 C.3d 238, 599 P.2d 636 (Cal.Supr.Ct., 1979); Commonwealth v. Sefranka, ___N.E.2d ___(Mass.Supr.Ct., 1980).

Each of these cases involved constitutional challenges to statutes which prohibited public solicitation of non-commercial sexual conduct. Each involved vague terms in the statutory prohibition, e.g., "lewd," "immoral," "obscene." It was the legislative use of such vague terms which caused the "overbreadth" problems, i.e., it was the vagueness of terms that created the First Amendment problems associated with a statute which prohibits the solicitation of non-criminal conduct.

In Pryor v. Municipal Court, supra, the California Supreme Court recognized the longstanding principle that "The judiciary bears an obligation to 'construe enactments to give specific content to terms that might otherwise be unconstitutionally vague.'" (emphasis added) "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." Moore Ice Cream v. Rose, 289 U.S. 373, 379 (1933). (emphasis added)

When a legislature uses vague language in defining a crime it becomes more possible for a court to interpret that statute

in a manner so as to avoid constitutional defects. Amicus Curiae acknowledges and accepts the longstanding principle that it is the duty of the judiciary to interpret words and phrases and in doing so to conform the statute to constitutional requirements.

It was because of the vagueness of the solicitation statutes mentioned above that it was possible, indeed the duty, of the appellate courts in those other jurisdictions to "save" those statutes without usurping or encroaching on the domain of the legislative department of government. However, in the instant situation, we have a statute which is extremely specific and abundantly clear in its terminology. The only room for judicial interpretation of ORS 163.455 would be to paraphrase the statute:

> Public solicitation of deviate sexual intercourse is a misdemeanor.

How could the Legislature have voiced its decision more clearly? Not only is the language specific, the legislative intent surfaces when we contrast ORS 163.455 (accosting for deviate purposes) with ORS 161.435 (criminal solicitation). The latter was intended to prohibit solicitation of certain crimes, the former to punish the public promotion of deviancy in matters sexual.

Because the language and intent of ORS 163.455 is so concise and clear the Court would violate the doctrine of separation of powers contained in Article III, Section 1 of the Oregon Constitution, were it to adopt an interpretation contrary to the manifest language of the statute. Judicial construction of a vague statute is one thing, but the narrowing of the scope of a clear and overly broad statute, although well intentioned, is nothing

less than judicial legislation. The former is constitutionally required, the latter is constitutionally repugnant.

ORS 163.455 is inconsistent with decriminalization of private sexual conduct between consenting adults

In 1971 the Oregon Legislature decriminalized private sexual conduct between consenting adults. It was a leader in this regard because only a small minority of states had taken such legislative action. Today, 22 states have passed laws which repealed statutes making such private conduct criminal activity. Two other jurisdictions, Pennsylvania and New York, have accomplished a similar result when their highest courts voided their "sodomy" statutes on privacy and equal protection grounds.

The key to avoiding criminal penalties under current sodomy laws in these jurisdictions is that the conduct occur in private, with another adult, and with consent. It is irrelevant whether the sexual partners are strangers or paramours, homosexual or heterosexual, married or unmarried.

It is common knowledge that most unmarried people seek social contacts in public places. One does not meet strangers in the privacy of one's bedroom. Inherent in the process of socialization is the requirement that a person go out into places of public accomodation to meet and mingle with others. Once an acquaintance is struck, the law requires that intimitate association, such as sexual liaison occur in a private place. Courtesy and common sense dictate that it is unwise to lure someone into a bedroom under false pretenses.

ORS 163.455 is inconsistent with all of the above-stated social and legal principles. With respect to engaging in oral or anal sex in private the law is clear - - one must obtain an informed consent before engaging in such practices. However, ORS 163.455 prohibits one from seeking such consent if the request is made in a public place, even though it may be a well known meeting place for such conversation, and even though the request is made of a willing listener in a non-offensive manner.

By definition, some classes of persons must either engage in oral or anal sex or remain celibate. The law does not require celibacy, nor should it. However, for all practical purposes, ORS 163.455 exerts a chilling effect on persons with a homosexual orientation. Many homosexual men are fearful of seeking consent of a seemingly willing partner for fear that the potential partner may be an undercover vice officer. And what about the heterosexual person who is disabled (e.g., spinal cord injury) and as a result must resort to oral sex for gratification? Should such persons be prohibited from seeking a willing partner to engage in a mutually agreeable sex act in private while their "normal" counterparts are free to speak freely in public places seeking a willing partner to sexual intercourse?

As long as ORS 163.455 remains in its present form, these inconsistencies will continue. Another well settled principle is that the judiciary bears an obligation to eliminate inconsistencies in the law. ORS 163.455 should be judicially excised for constitutional reasons.

ORS 163.455 is unconstitutionally overbroad in violation of freedom of speech

In the case of Pryor v. Municipal Court, supra, the California Supreme Court recently acknowledged that:

> It is questionable whether the state could constitutionally punish nonobscene solicitations of lawful acts which are not inherently likely to provoke a breach of the peace. (footnote 11)

The Court then avoided deciding that issue head on because it was able to constitutionally interpret some vague language ("lewd or dissolute conduct") so as to eliminate private sexual conduct between consenting adults from the prohibition.

In Pederson v. City of Richmond, supra, the Supreme Court of Virginia stated:

> It would be illogical and untenable to make solicitation of a non-criminal act a criminal offense. We will follow the common law principle that the acts encompassed by the solicitation ordinance must be criminal in nature." Id, at 98.

However, because the Oregon Legislature was clear in its prohibition and because it unquestionably departed from the common law principle of solicitation being limited to a request to commit a crime, this Court is squarely faced with a First Amendment problem. There appears no way in which the Court can reasonably or logically avoid deciding the free speech issue.

The United States Supreme Court has "fashioned the principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is

directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

ORS 163.455 is not limited by its terms to the solicitation of imminent lawless action, much less to any lawless action. By its plain terms it prohibits the soliciation of both lawful and unlawful deviate sexual intercourse.

It seems to be for this reason that the Attorney General has asked this Court to reinterpret this statute so as to avoid conflict with this constitional principle. The Attorney General does not argue that the state may constitutionally prohibit the solicitation of lawful sexual conduct, but rather focuses on the method the Court should use to cure the obvious defect.

There are two reasons why the Court may not follow what on the surface appears to be a tempting solution. First, an overbroad statute which sweeps under its coverage both protected and unprotected speech will normally be struck down as facially invalid, although in a non-First Amendment situation the court would simply void its application to protected conduct. Zwickler v. Koota, 389 U.S. 241 (1967); United States v. Robel, 389 U.S. 258 (1967); Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Doran v. Salem Inn, 422 U.S. 922, 932-934 (1975). This longstanding principle is reason enough for this Court to declare the statute facially invalid.

However, as an additional incentive not to "rewrite" the statute, the Court should consider the consequences of any such attempt to salvage this law. If the Court limited the scope of

ORS 163.455 to public solicitations of deviate sexual intercourse to be performed in a public place, an inconsistency is created between ORS 163.455 (accosting for deviate purposes) and ORS 161.435 (criminal solicitation). Either statute could be used to prosecute a solicitation for deviate sexual intercourse intended to be performed in a public place. ORS 163.455 would be proper if the solicitation itself occurred in a public place; ORS 161.435 regardless of the locus of the solicitation. When should one statute be used as opposed to the other? There is a principle of law that when there is more than one statute on a subject and one is general and the other more specific, the more specific should be used. Under this principle, it would seem that a public solicitation of deviate sexual intercourse to be performed in public should be prosecuted under ORS 163.455 since it would specifically cover this subject. Under such a rationale, solicitation for deviate sexual intercourse would be only a Class C misdemeanor.

Then what of a solicitation for "normal" sexual intercourse intended to be performed in a public place? It would be prosecutable under ORS 161.435 (via the theory that it is a soliciation to commit a Class A misdemeanor, i.e., solicitation to commit public indecency.) Since there is no other statute on the subject, such a solicitation would be punishable as a Class B misdemeanor.

Therefore, if the Court adopts the "remedy" proposed by the Attorney General, it will be creating a more preferred status for solicitation of deviate sexual intercourse than for "normal" sexual intercourse. This is obviously not what the Legislature intended when it adopted the present statutory scheme - - quite the opposite.

There is only one logical and constitutional remedy which

eliminates the actual and potential inconsistencies in the code. The Court should declare ORS 163.455 to be unconstitutionally overbroad in violation of the protections of freedom of speech under the state and federal constitutions and should invalidate this statute on its face. The only resulting losses will be redundancy, inconsistency, and unconstitutionality.

Conclusion

In the case of People v. Gibson, 521 P.2d 774 (Colo.Supr.Ct., 1974), the Colorado Supreme Court was faced with a situation very similar to the one present in the instant case. The Colorado Legislature adopted a general penal code revision package in 1971. In that new code the Legislature had decriminalized private sexual conduct between consenting adults. Although the Legislature did not adopt a solicitation provision in that code, it did adopt the following statute:

> A person commits a class 1 petty offense if he: Loiters for the purpose of engaging or soliciting another person to engage in . . . deviate sexual intercourse."

In response to arguments made by the Colorado Attorney General, the Colorado Supreme Court responded in a manner which may be of great benefit here:

> The People have cited to us the rule that if a statute is fairly susceptible of two interpretations, one of which is constitutional and the other unconstitutional, a reviewing court must construe the statute so as to render it constitutional. If the statute is to be construed at face value, as we have done, it is susceptible of but one interpretation. The result is that it is unconstitutional. * * *

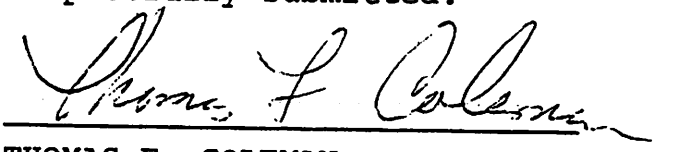
> Because the People's construction would force us in effect to amend the statute, and because the construction would produce inconsistencies within the Code, we are obliged not to make this construction. Gibson, supra, at pp. 775-776.

Were this Court to void on its face ORS 163.455 (accosting for deviate purposes), there would be no void in the regulation of speech for legitimate governmental purposes. Solicitation of public indecency (regardless of whether it is homosexual or heterosexual, deviant or "normal") would remain a crime under the provisions of ORS 161.435 (criminal solicitation).

For all of the foregoing reasons, this Court should enter an order setting aside the conviction and direct the trial court to vacate its order overruling the demurrer and instead to enter an new order sustaining the demurrer and dismissing the complaint.

Dated: March 22, 1981

Respectfully submitted:



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