No. 332853

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant

v.

JOHN THOMAS MUSIC,

Respondent

APPEAL FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY
THE HONORABLE JOHN W. LOHRMANN

APPELLANT'S REPLY BRIEF

Respectfully submitted:

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I. IDENTITY OF APPELLANT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Appellant herein.

II. RELIEF REQUESTED

The State asserts the equitable doctrine of laches barred Defendant's Motion to Vacate his judgment, or alternatively, that his conviction for Sodomy should stand.

III. ISSUE

Was Washington's Sodomy statute, now repealed, constitutional as applied to prison inmates such as Defendant?

IV. STATEMENT OF THE CASE

On November 1, 1974, the Respondent John Music and five other prison inmates sexually violated Jon Mathers, another prison inmate, against his will. Affidavit of Hon. Donald W. Schacht, CP 112-13. "Jon Mathers, an inmate and the victim of the incident, testified that he was forced to commit sodomy for 1½ hours with six members of the prison motorcycle club, including Music and [Leonard] Larson, during a movie in the prison theater . . . . Larson and two other inmates, identified only as Doyle and Carlyle, confronted him in the prison's outdoor breezeway, and after threatening him, took him to the theater where the incident

occurred." Dick Cockle, *Prisoners Found Guilty of Sodomy*, UNION BULLETIN, May 26, 1975, CP 95.

Music was convicted of Sodomy under RCW 9.79.100 (Repealed 1976) and was sentenced on April 23, 1975 to up to ten years in prison. CP 32. The duration of his confinement for this conviction, his later Pierce County (assault) and Walla Walla County (escape) convictions, and his prior King County murder conviction are all subject to the determination of the Indeterminate Sentence Review Board.

V. ARGUMENT

A. The Facts of Music's Sodomy Case Are Relevant and Can be Considered Because Music Does Not Assert a First Amendment Issue

Music misreads the State's argument to be that the law may only be facially attacked on First Amendment grounds. Respondent's Brief at 12. This is not the State's argument.

The State has argued that, in the absence of a First Amendment challenge, the facts are relevant. Appellant's Brief at 5, 17-18. Facts are irrelevant in a First Amendment challenge. *E.g., City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990). For all other challenges, the facts are relevant. *In re Dependency of C.B.*, 79 Wn. App. 686, 689, 904 P.2d 1171 (1995) (citing *State v. Carver*, 113 Wn.2d 591,

599, 781 P.2d 1308, 789 P.2d 306 (1986)); *Seattle v. Yeager*, 67 Wn. App. 41, 44, 834 P.2d 73 (1992). Sodomy is not speech. Therefore, it falls under the latter analysis. The facts of this particular offense are relevant to the Court's analysis.

B. Music is a Prison Inmate and Does Not Have the Same Expectations of Privacy as a General Member of the Community

Music asserts that *Lawrence v. Texas*, 539 U.S. 558, 123 S Ct. 2475 (2003) applies to his case because *Lawrence v. Texas* held that the State may not interfere with the personal and private life of individuals. Respondent's Brief at 17. However, Music has offers no authority for the proposition that prison inmates have all of the same privacy interests that the general public has. *See* Appellant's Brief at 7. On the contrary, an inmate loses many rights, including privacy rights, as a direct result of a criminal conviction.

Inmates cannot consent to sexual conduct in prison. *U.S. v. Brewer*, 363 F. Supp. 606 (M.D. Pa. 1973), *aff'd*, 491 F.2d 751 (3rd Cir. 1973); *see also* RCW 9A.44.160 (an inmate cannot consent to sexual contact with a correctional officer). In *U.S. v. Brewer*, a prison inmate argued the Pennsylvania sodomy statute was facially unconstitutional where both inmates consented. 363 F. Supp. at 607. The court observed that Pennsylvania's "broad 'victimless'" sodomy statute would likely be

found unconstitutional as applied to a person who was not incarcerated. *Id.* at 608. But those were not the facts before the court. *Id.* Therefore, the court had to weigh the interests of the penal system — which include the duty to protect inmates "from sexual and other assaults in prison" — against the rights of the inmates to give valid consent. *Id.* The court held:

> It is not necessary to reach the result in this case on the basis of finding an absence or near absence of a prisoner's right to privacy. The interest in preventing disorder in prison and injury to prisoners is sufficient to justify the existence of a prison regulation, or a state or federal statute, prohibiting consensual acts of sodomy between prison inmates. Two additional factors to be considered in balancing the state's interest in proscribing a prisoner's conduct against asserted constitutional rights or privileges are: (1) the threats of violence which may cause a victim to "consent" to sodomy, and as a corollary, the difficulty in proof, and (2) the very tense and potentially dangerous situation existing within the prison confines as opposed to society at large. These additional factors convince the court that "consensual" sodomy between inmates may be validly prohibited.

Id.

Music asserts that because Washington's repealed sodomy statute would likely be unconstitutional if applied to a member of the general public, the same must be true for prison inmates. However, as the *Brewer* court recognized, a defendant cannot raise the challenge on behalf of the general public or a hypothetical third party. *Id.* at 608-09.

> [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

Id. at 609 (quoting *United States v. Raines*, 362 U.S. 17, 21, 80 S. Ct. 519, 4 L.Ed.2d 524 (1960)) (internal quotation marks omitted).

There are exceptions to this rule, as outlined in *United States v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L.Ed.2d 524. The *Brewer* court found they did not apply.

The *Brewer* case is on all fours with the case at bar: the only difference is that while the defendant there demonstrated he had affirmative consent, Music has no such evidence. The *Brewer* court's analysis, even though fifty years old, is just as applicable today. Indeed, it even appears to have anticipated *Lawrence v. Texas*. 539 U.S. 558, 123 S Ct. 2475. Here, the exact same situation is before the Court. Like the *Brewer* court, this Court should ask: is Music the right person to challenge Washington's repealed Sodomy statute on behalf of *un*incarcerated people? The answer is "no" for the same reason. The claimant is the wrong party to bring the matter before the Court. Bad facts make bad law: these are not the right facts to retroactively find Washington's Sodomy statute unconstitutional, and the Court should not feel compelled to find the statute facially unconstitutional merely because the Sodomy statute would potentially be unconstitutional under different circumstances.

C. The State's Is Not Requesting this Court Convert Music's Conviction to Rape

Music argues that the State's explanation of the historical events is an attempt to trick the Court into retroactively finding Music guilty of Rape. Respondent's Brief at 16-17. Nowhere in the Appellant's Brief does the State assert the Court should make such a finding. Section C of the brief only identifies a common past practice when dealing with sex offenses in prison. Appellant's Brief at 11-14.

Music also argues that the State impermissibly cited to an unpublished opinion. Appellant's Brief at 25-26. The offending case is Music's own, cited not as substantive authority, but merely to address a fact that is in dispute. This is a permissible exception. *State v. Evans*, 177 Wn.2d 186, 196 n.1, 298 P.3d 724 (2013); *see also Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wn.2d 835, 839, 64 P.3d 15 (2003) (reference to a party's identical case, which was resolved in an unpublished opinion, permitted as a historical reference to provide context to the case at bar).

D. The Honorable Judge Schacht's Affidavit Regarding of Events That Occurred in Open Court Is Not Privileged Information

Music asserts that because the Honorable Judge Schacht was his defense attorney, his affidavit regarding his observations from the open court proceedings are somehow a disclosure of private communications

between client and counsel. Respondent's Brief at 25. Under the Rules of Professional Conduct, a lawyer may relate information that has "become generally known." RPC 1.9(c)(1). Once a matter is on public record, it is generally known. The Honorable Judge Schacht relayed information that was, at one point, on the record (even though that record has long since been destroyed per the court's standard record keeping practices). Since the Honorable Judge Schacht did not disclose any confidential information, Music's assertion fails, and information within the affidavit is properly before the Court.

E. Music's Argument, Taken to Its Logical Conclusion, Would Eliminate Prisons' Ability to Regulate Prison Rape

According to Music's position, prison inmates have a constitutional right to consent to sex with other inmates in prison. Respondent's Brief, *passim*. The corollary of this is that the government cannot infringe on that consent by statutorily eliminating inmates' ability to give consent. WN. CONST. art. 1, § 2 ("The Constitution of the United States is the supreme law of the land.") Thus, any State or federal statute that would outlaw prison rape irrespective of consent would be facially unconstitutional for the same reason Music asserts here. Since Washington Administrative Code 137-25-030(504) disallows sexual acts outside of conjugal visits within prison facilities — with no reference to

consent — the Court here would have to find WAC 137-25-030(504) unconstitutional if it finds that inmates can commit sodomy within prison walls.

The Supreme Court created a four-part analysis to examine whether a regulation infringes on prison inmates' fundamental rights. *Turner v. Safley*, 482 U.S. 78, 89-90, 107 S. Ct. 2254, 96 L.Ed.2d 64 (1987). In *Turner v. Safley*, the Court addressed a prison regulation that restricted correspondence between inmates in different penal institutions and prohibited prison inmate marriage. 482 U.S. at 81-82, 107 S. Ct. 2254, 96 L.Ed.2d 64. The Court upheld the regulation controlling correspondence, but it declared the restriction on marriage unconstitutional. *Id.* at 81. The four-part test required 1) the existence of "a valid, rational connection between the prison regulation and a legitimate and neutral governmental interest put forward to justify it"; 2) the existence of "alternative means of exercising the asserted right that remain open to prison inmates;" 3) the "impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and 4) "the absence of ready alternatives as evidence of the reasonableness of the regulation." *Id.* at 89-90, 107 S. Ct. 2254, 96 L.Ed.2d 64 (internal quotation marks omitted).

With respect to the first part of the *Turner* analysis: the United States Congress recognized sexual deviancy within prison walls had expanded to epidemic proportions, and it enacted the Prison Rape Elimination Act (PREA) to curb prison rape. 42 U.S.C. § 15601-609. PREA was designed to protect inmates from cruel and unusual punishment, as required by the Eighth Amendment. U.S. CONST. amend. VIII; *see also* U.S. CONST. amend. XIV (extending United States Constitution to States); *cf. Farmer v. Brennan*, 511 U.S. 825, 832-33, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994) (noting the duty to protect inmates from inhumane prison conditions). The United States Congress recognizes that sexual violence is more prevalent in prison than in the general populace, and thus it requires greater intervention. For the reasons outlined in *Farmer v. Brennan* and discussed in Appellant's Brief at 9-10, the State has a neutral and legitimate interest in preventing unsupervised and unsanctioned sexual conduct within prison walls.

Turning to the second *Turner* prong: inmates are allowed conjugal visits. WAC 137-25-030(504). Thus, there is an available alternative.

With respect to the third issue: accommodation of unsupervised sexual contact between inmates could create a hardship for prison corrections officers who would be required to determine whether the sexual act was truly consensual, or whether one of the participants was

coerced by threat or force to acquiesce. *Cf. Carrigan v. Davis*, 70 F. Supp.2d 448 (D. Del. 1999) (detailed analysis of consent in the criminal context, ultimately concluding that prison inmates cannot consent to sex with prison guards). Corrections officers should not be required to make that determination, as an erroneous conclusion could result in a violation of the Eighth Amendment. U.S. CONST. amend VIII (protection against cruel and unusual punishment); *Farmer v. Brennan*, 511 U.S. at 833, 114 S. Ct. 1970, 128 L.Ed.2d 811 ("gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective." (internal quotation marks omitted)). If a corrections officer is required to inquire whether both inmates consent, there would be a very real potential that a non-consenting inmate would lie out of fear that "outing" the rapist would result in even greater reprisal from the rapist. A blanket conclusion that consent is a non-issue in the prison context protects the inmates from being exploited, and it protects the State from unwittingly violating inmates' Eighth Amendment rights. A blanket rule is appropriate unless and until Washington's penal system can adequately evaluate alternative safeguards to protect consensual sex between inmates — something that would require legislative and administrative procedures to be put in place in advance. In Music's case, no such measures existed at the time of the offense, and there is no evidence that corrections officers from the 1970s

would have been adequately trained to make the kind of evaluation Music demands.

Finally, there are no "ready alternatives" to sodomy in prison because, other than the rare conjugal visit, no sex of any kind is permitted in prison. Further, here, there was never any evidence relating to consent or non-consent. Rather, the record is silent whether Music received consent from the inmate he and five other inmates had anal intercourse with and were fellated by for over an hour and a half. Therefore, it is unclear whether Music could claim or expect any kind of "alternative that [would] fully accommodate[] the prisoner's rights at *de minimis* cost to valid penological interests." *Turner*, 482 U.S. at 91, 107 S. Ct. 2254, 96 L.Ed.2d 64.

The State has a legitimate reason to regulate sex within prison walls. Washington's Sodomy statute, when viewed in the context of regulating prison inmates, did just that. Accepting Music's argument that prison inmates have all of the same rights as the general public with respect to sexual privacy would create an undue and unnecessary burden on the penological system that would have far-reaching consequences and would endanger prison inmates. Therefore, the Sodomy statute must be found constitutional as applied to Music.

VI. CONCLUSION

For the foregoing reasons, the State respectfully submits that the Order to Vacate Judgment & Sentence should be reversed.

Respectfully submitted this 23rd day of September, 2015.

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