

COURT OF APPEALS

JUN 12 2013

No. 34912-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON,
Respondent,

v.

JOSEPH H. STEEN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

The defendant was charged by Amended Information with Indecent Exposure, RCW 9A.88.110, Count I, and Violation of the Uniform Controlled Substance Act - Possession of Methamphetamine, Count II, RCW 69.50.4013(1). The Information contained a supplemental allegation regarding Count I that the defendant had previously been convicted of a sex offense and that the crime was sexually motivated. RCW 9.94A.835. The defendant waived his rights to a jury and the matter was tried to the court on March 15, 2006. The defendant was found guilty of both counts. Findings of Fact and Conclusions of Law were entered which are undisputed. Appendix A.

At about 6:00 a.m., Diane Earl went to her kitchen window to smoke a cigarette. Through the open window, she saw the defendant standing in the yard immediately below her apartment building. The defendant looked up at her, pulled down his sweat pants and exposed his genitals. He began massaging his genitals and moving them up and down with both hands. (Findings of Fact 1, 2).

Ms. Earl went to her cell phone to call the police. When she came back to the window, the defendant was leaning against a nearby garage. His back was arched and he was manipulating his penis with his pants down. (Findings of Fact 3).

Police arrived and placed the defendant under arrest. A tube of Vaseline and a printed page of sexually explicit websites were seized from the defendant's coat incident to his arrest. (Findings of Fact 7). The defendant's hat and an umbrella that he was carrying were placed in the patrol car. The hat was later searched and a small quantity of Methamphetamine was found inside the hatband of the hat. (Findings of Fact 8).

Evidence at trial established that the defendant had previously been convicted of Voyeurism in Grays Harbor County Cause No. 03-1-310-0. (Findings of Fact 9). The court made the determination that the acts observed by Ms. Earl were done by the defendant for his sexual gratification.

RESPONSE TO ASSIGNMENTS OF ERROR

RCW 9A.88.010 is not unconstitutionally vague (Response to Assignment of Error No. 1)

A person commits the crime of Indecent Exposure when he intentionally makes "...any open and obscene exposure of his person..." knowing that the conduct is likely to cause reasonable affront or alarm. RCW 9A.88.010.

The term "open and obscene exposure" appeared as early as the territorial code. Code 1881, §948:

...if any man or woman, married or unmarried, is guilty of open or gross lewdness or designedly make any open or indecent or obscene exposure of his or her person, or of the person of another, every such person shall be punished by imprisonment in the county jail not exceeding six months...

The legislature later defined the crime of Lewdness to include, in part, "...any open and indecent or obscene exposure of his person, or the person of another...". Laws of 1909, ch. 249, §206. Also, the former RCW 9.79.080(2) defined the crime of Indecent Exposure, in part, as any "indecent or obscene exposure of his person of his person, or the person of another, whether with or without his or her consent". The lewdness statute was later codified as RCW 9.79.120 and was in place until the adoption of the Criminal Code in 1975. Thereafter, the crime was defined as Public Indecency. Former RCW 9A.88.010 Law of 1975, 1st Extraordinary Session, ch. 260.

The Washington Supreme Court has previously ruled on the question of whether the phrase "open and obscene exposure of the person..." is constitutionally vague. State v. Galbreath, 69 Wn.2d 664, 419 P.2d 800 (1966). In Galbreath the defendant was charged under RCW 9.79.080 in which the Information alleged that the defendant did "...make an indecent or obscene exposure of his person in the presence of ... a female child under the age of 15". Galbreath, 69 Wn.2d at page 666. The court had no difficulty determining that the language was not

unconstitutionally vague. Citing to Bouie v. Columbia, 378 U.S. 347, 350, 12 L.Ed.2d 894, 84 Sup.Ct. 1697 (1964) the court held as follows:

The words “indecent” and “obscene” are common words, of common usage and enjoy a commonly recognized meaning among people of common intelligence. Though such words may have different imputations in varying context, when they are used in the phrase “indecent or obscene exposure of the person” they project a connotation readily understandable to persons of ordinary comprehension, however cynical, sophisticated, or bohemian their attitudes might otherwise be.

Galbreath, 60 Wn. 2d at page 668.

The court reached the same result in State v. Roberts, 69 Wn.2d 921, 923-24, 421 P.2d 1014 (1996).

While the principles cited by the defendant are certainly correct, the defendant has cited no authority to support the claim that RCW 9A.88.100 is so vague that persons of common intelligence must guess at its meaning or would differ as to its applicability. City of Bellevue v. Lorang, 140 Wn.2d 19, 992 P.2d 496 (2000) dealt with a statute prohibiting “profane” speech. This case is not about restricting the exercise of constitutionally protected behavior. State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001), cited by the defendant, addressed that portion of the harassment statute which prohibited a person from knowingly threatening to do a malicious act intended to substantially harms another’s mental health. It is of no help here.

This is not an issue of defining “obscenity”. Jacobelos v. Ohio, 378 U.S. 184, 84 Sup.Ct.1676, 12 L.Ed.2d 793 (1964). In the context of the statute, taking into account the conduct prohibited, the meaning of the phrase “open and obscene exposure of the person” is clear. As noted by the Washington courts, Galbreath, 69 Wn.2d at page 668:

Certainly, in the annals of the law the phrase “indecent or obscene exposure of the person”, has, through usage, developed a traditional and well settled meaning, which undoubtedly compares favorably to the meaning attributed thereto by the average layman. In short, the legal writers and scholars have long conceived the phrase to signify and relate to the lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety shall require be customarily kept covered in the presence of others...

In our view, further, a more detailed legislative delineation of the particular misconduct which [the statute] obviously interdicts is neither dictated by any flux in social values nor otherwise constitutionally required. We are satisfied that any person of common understanding, contemplating a lewd exhibition of the private parts of his or her person before a child under the age of 15 years, need not guess nor speculate as to the proscription and penalties of the statute as it is presently written.

This assignment of error must be denied.

The defendant was properly informed of the nature of the charge. (Response to Assignment of Error No. 2)

As concerns Count I, Indecent Liberties, the State alleged that the crime was sexually motivated. The Information contains the express language defining sexual motivation, alleging that “...one of the purposes

for which the defendant committed the crime was for the purpose of his sexual gratification”. RCW 9.94A.030(42). This allegation has two consequences for the defendant: (1) It makes the current offense a “sex offense”, RCW 9.94A.030(41)(c); and (2) the allegation is an aggravating circumstance which, if pled and proved to the trier of fact, may form the basis for a sentence above the standard range. RCW 9.94A.535(2)(f).

There is no issue concerning the constitutional sufficiency of the charging document. The allegation that the crime of Indecent Liberties was sexually motivated is set forth in the express language of the statute. It contains all of the “essential elements” to support the allegation that the crime is sexually motivated. See State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The defendant has been fully and fairly informed of the “...nature and cause of the accusation...”. US Const. Amend. 6. Likewise, the Information, in total, is a “...plain, concise, and definite written statement of the essential facts constituting the offense charged.” CrR 2.1(b).

The defendant would ask for more. Apparently, the defendant is now alleging that the Constitution requires that the defendant be informed of not only the nature and cause of the accusation, but of the State’s recommendation concerning what punishment may follow. The State is unaware of any such requirement.

The defendant asserts that RCW 9.94A.537 requires the prosecution to both inform the defendant of the aggravating circumstance and to inform the defendant that it will, apparently under any and all circumstances, seek a sentence above the standard sentencing range. This is a tortured reading of the statute.

The purpose of RCW 9.94A.537 is to provide a procedure by which the defendant will be given notice that he may be subject to a sentence above the standard sentencing range. Unlike a firearm allegation, RCW 9.94A.533(3), for instance, there is no fixed additional punishment. The statute provides notice that sexual motivation is an aggravating circumstance and a finding of sexual motivation by the trier of fact may result in a sentence above the standard sentencing range.

The prosecuting attorney is obligated to:

file a special allegation of sexual motivation in any every criminal case other than sex offenses... when sufficient admissible evidence exists, which when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective trier of fact. RCW 9.94A.836.

This does not mean, however, that the State should be obligated to ask for an exceptional sentence in every case in which an allegation of sexual motivation has been made. The simple purpose of RCW 9.94A.537

is to place the defendant on notice that he may be subject to imposition of an exceptional sentence.

A prosecutor is a quasi judicial officer representing the people of the state of Washington. It is his obligation to act impartially and in the interests of justice. State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). This necessarily means that the State have before it all the factors necessary for a final determination of what the appropriate sentence should be.

In fairness to the defendant, the notice of intent to seek an exceptional sentence must be made prior to trial and at a time when substantial rights of the defendant will not be prejudiced. There may be factors that the defendant presents in mitigation which the State may properly consider. There may develop problems of proof that require plea negotiation. The short answer is that the legislature could not have intended to require the State to give notice that it will, without fail, ask for the imposition of an exceptional sentence.

The defendant was informed that the State was alleging aggravating circumstances. The defendant was put on notice that a sentencing above the standard range was a possibility. That is all that is required.

This assignment of error must be denied.

CONCLUSION

This court must affirm the conviction.

Dated this 28 day of November, 2006.

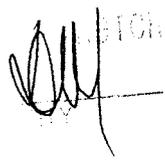
Respectfully Submitted,

By: Gerald R Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/jfa

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STATE OF WASHINGTON,

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DECLARATION OF MAILING

JOSEPH H. STEEN,

Appellant.

DECLARATION

I, Wendy Sivonen hereby declare as follows:

On the 28th day of November, 2006, I mailed a copy of the Brief of

Respondent to Manek R. Mistry and Jodi R. Backlund; Backlund & Mistry; 203 East Fourth Avenue, Suite 404; Olympia, WA 98501 and to Joseph H. Steen; #844213; Stafford Creek Corrections Center; 191 Constantine Way; Aberdeen, WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

