

NO. 43746-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHON CLAPPER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Ronald E. Culpepper, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

RCW 9A.44.160 is unconstitutionally vague and violates the Fourteenth Amendment and article I, section 3 of the state constitution.

Issue Pertaining to Assignment of Error

1. Whether RCW 9A.44.160 is unconstitutionally vague where an ordinary person could not determine whether the undefined term “the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision” applies to a correctional line officer with no authority to make decisions about an inmate’s privileges or punishments.

B. STATEMENT OF THE CASE

Jonathon Clapper was charged with custodial sexual misconduct in the first degree, RCW 9A.44.160. CP 57. The parties stipulated that Mr. Clapper had sexual intercourse with Lesley Reed, an inmate at Purdy, while he was employed as a correctional officer in 2008. 2RP 241. RCW 9A.44.160 makes it a felony for certain DOC employees to have sexual intercourse with an inmate, whether consensual or not. The statute states that the employees included are those with “the ability to influence the terms, conditions, length, or fact of incarceration or correctional

supervision,” or those whom the inmate “reasonably believes” have that ability. RCW 9A.44.160(1)(a)(ii).

Mr. Clapper brought several motions challenging the constitutionality of RCW 9A.44.160. One of the motions he brought moved to dismiss the charges because the statute was unconstitutionally vague. 1RP 23; 3RP 330-34. The court denied Mr. Clapper’s motions, finding the statute constitutional. 1RP 71-72; 3RP 337.

He also argued that the statute invaded his article 1, section 7 right to be free from State interference in his private affairs. RP 11/2/11 22-31. The motions were denied. RP 11/2/11 48.

Mr. Clapper also brought a Knapstad¹ motion to dismiss prior to trial, arguing that the State could not prove a prima facie case, specifically, that he had the “ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision.” RP 11/2/11 3. The court denied this motion, finding that the facts were sufficient to present the case to the jury. RP 11/2/11 21.

¹ State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

Lesley Reed testified that she gave oral sex to Mr. Clapper in July or 2008, while she was an inmate and he was a correctional officer ("CO"). 2RP 154-56. According to Ms. Reed, Mr. Clapper caught her and another inmate, Rachel Lambert, when they were in the process of stealing snacks from the canteen cart in early July. 2RP 146, 148. Ms. Reed and Ms. Lambert asked Mr. Clapper not to report this activity. 2RP 150. Mr. Clapper told the women that if they put back the snacks, he would not report it and then he left. 2RP 150. Ms. Reed saw Mr. Clapper again in passing throughout July and although Mr. Clapper never said anything about the incident, Ms. Reed said she remained afraid he might still report the attempted theft. 2RP 151-52.

Ms. Reed said that in late July, when she had oral sex with Mr. Clapper, he still did not speak to her about the theft incident or threaten her. 2RP 155-57.

Ms. Reed did not report the alleged incident to DOC. 2RP 157. Instead, the first time DOC was told about the alleged incident was when Ms. Reed filed a civil lawsuit after her release asking for monetary damages. 2RP 215.

Ms. Reed testified that she believed Mr. Clapper, as a CO, was there to "supervise" the "activities" of any inmate he could see.

2RP 137, 183-84. He was not assigned to her living unit, but she saw him around the laundry, where she worked. 2RP 179, 183. She believed that if a CO caught an inmate breaking a rule, “you would go in the hole.” 2RP 140. She clarified later that the CO might just give the inmate an infraction, depending on the severity of the conduct. 2RP 140. An infraction, she said, was a “write up” of the conduct, and she said she thought maybe if there is an infraction, there was a hearing. 2RP 140. Ms. Reed was uncertain of what would happen with an infraction because she had never had one. 2RP 140. Ms. Reed believed that an infraction could result in punishment like “the hole,” or a loss of privileges, such as school or a job. 2RP 142. According to Ms. Reed, the judge set her sentence and its conditions, and her assigned counselor at Purdy set her release date and decided when she would go to work release. 2RP 170-73. She had never seen Mr. Clapper take anyone to “the hole.” 2RP 179.

Jennifer Piukkula, a DOC investigator and former CO, testified to the job responsibilities of a CO2 like Mr. Clapper. 2RP 189-90, 203. She testified that a CO2 is responsible for monitoring offenders, supervising their movement, and preventing the

movement of contraband by conducting cell searches². 2RP 204. According to Ms. Piukkula, any staff member can “infract” an offender by writing it up and submitting it to the sergeant of the unit. 2RP 195. Ms. Piukkula testified that: “[a]n infraction is not discipline. It is basically an on-site adjustment toward your behavior.” 2RP 196. If the conduct is minor, the CO is not required to write an infraction and can give a verbal warning. 2RP 196. Minor conduct would include theft of property of less than \$10 in value. 2RP 197.

The sergeant then reviews the infraction and may or may not sign off on it. 2RP 195. If the sergeant signs off on the infraction, the inmate is given a copy and it is submitted to the hearings department for a formal hearing with due process. 2RP 195, 200. The inmate is entitled to counsel at the hearing and can present witnesses. 2RP 200. The hearing examiner must find the offense occurred by a preponderance of the evidence and only then can the examiner assign consequences. 2RP 200. An inmate can appeal the decision of the hearing examiner. 2RP 196. The hearing

² However, the unit sergeant is the only one who can authorize a cell search and two staff members must be present. 2RP 205, 214.

examiner imposes the discipline, which can be anything from a loss of phone privileges to lost good time. 2RP 201.

An inmate is placed in segregation (“the hole”) only for the most severe offenses and only after a hearing finding that the offense occurred. 2RP 198. Although a CO may cuff an inmate and secure her without a hearing, this can only be done in severe instances, such as a fight, and only upon approval of the sergeant in charge. 2RP 198-99.

Rachel Lambert testified that in July 2008, Mr. Clapper had caught her and Ms. Reed stealing snacks and let them go with a verbal warning. 2RP 227. Ms. Lambert said that although Mr. Clapper left after the incident without any threats, she was afraid if he had reported the incident; she might go to segregation or be dismissed from the work program. 2RP 228, 233, 239. According to Ms. Lambert, after this incident, Mr. Clapper said to her: “You and Lesley are two beautiful women; you’re lucky I don’t bribe you.” 2RP 234. Ms. Lambert said later in July, she found Ms. Reed alone in the Laundry upset and crying. 2RP 237.

The parties stipulated that Mr. Clapper and Ms. Reed had oral sex in July 2008 when he was a CO and she was an inmate. 2RP 241.

Mr. Clapper moved to dismiss at the close of the State's case and again at the end of the trial, arguing that the State had not proved that he had the "ability to influence the terms or conditions" of incarceration or supervision. 2RP 243; 3RP 287. The motions were denied. 2RP 255; 3RP 388.

The jury found Mr. Clapper guilty as charged. 3RP 319. He was sentenced in the standard range and this appeal timely followed. 3RP 361-2.

C. ARGUMENT

1. RCW 9A.44.160 IS UNCONSTITUTIONALLY VAGUE BECAUSE AN ORDINARY PERSON COULD NOT DETERMINE WHETHER THE UNDEFINED TERM "THE ABILITY TO INFLUENCE THE TERMS, CONDITIONS, LENGTH, OR FACT OF INCARCERATION OR CORRECTIONAL SUPERVISION" APPLIES TO A CORRECTIONAL LINE OFFICER WITH NO AUTHORITY TO MAKE DECISIONS ABOUT AN INMATE'S PRIVILEGES OR PUNISHMENTS.

Both the Fourteenth Amendment and article I, section 3 of the state constitution require that citizens have fair warning of proscribed conduct. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). To this end, the language of a penal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its

penalties.” Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). The United States Supreme Court has explained, “The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” States v. Harris, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954); see also Douglass, 115 Wn.2d at 178.

A statute fails to provide the required notice if it “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” Connally, 269 U.S. at 391 (citing Collins v. Kentucky, 234 U.S. 634, 638, 34 S.Ct. 924, 58 L.Ed. 1510 (1914); Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221, 34 S.Ct. 853, 58 L.Ed. 1284 (1914)); see also State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992) (quoting Douglass, 115 Wn.2d at 179); Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”).

A statute is unconstitutionally vague if it “(1) ... does not define the criminal offense with sufficient definiteness that ordinary

people can understand what conduct is proscribed, or (2) ... does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Douglass, 115 Wn.2d at 178 (citing Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). If either of these requirements is satisfied, the ordinance is unconstitutionally vague.

A challenge to the constitutionality of a statute is an issue of law and is reviewed de novo by the court. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997). If the statute does not involve First Amendment rights, the statute is evaluated under the particular facts of the case. Coria, 120 Wn.2d at 163.

The constitutionality of RCW 9A.44.160 has not yet been decided. RCW 9A.44.160 provides, in relevant part:

(1) A person is guilty of custodial sexual misconduct in the first degree when the person has sexual intercourse with another person:

(a) When:

(i) The victim is a resident of a state, county, or city adult or juvenile correctional facility, including but not limited to jails, prisons, detention centers, or work release facilities, or is under correctional supervision; and

(ii) The perpetrator is an employee or contract personnel or a correctional agency and the perpetrator has, or the victim reasonably believes the perpetrator has, **the ability to**

influence the terms, conditions, length, or fact or incarceration or correctional supervision; . . .

(emphasis added).

As a preliminary matter, because both alternative means to committing the crime under this statute include this undefined phrase, it does not matter if a defendant is charged as actually having the “ability to influence” or the inmate’s “reasonable belief” that the defendant has the “ability to influence.” The State argued that the jury could convict Mr. Clapper under either means. 3RP 292-300. No unanimity instruction was given and Mr. Clapper’s request for one was denied. 3RP 280-81. Either means would require the jury to determine the meaning of the “ability to influence” language.

It is unclear what the “ability to influence” means as applied to a correctional line officer. There is no elaboration or definition within the statute for this essential term. This statute is unconstitutionally vague because a person of reasonable intelligence would have to guess whether the undefined term “the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision” applies to a correctional

line officer with no authority to make decisions about an inmate's privileges or punishments.

The evidence in this case showed that a correctional line officer (CO2) like Mr. Clapper was on the lowest rung of the correctional hierarchy. According to Ms. Piukkula, the DOC employee called by the State, a CO2 only has the authority to write an infraction on an inmate. 2RP 195. According to Piukkula, the infraction itself is not discipline; "it is basically an on-site adjustment toward [inmate] behavior." 2RP 196. That infraction has no impact on the inmate until after the sergeant in charge of the unit reviews it and decides whether to submit it to the hearings department. 2RP 195. Then, a full hearing with witnesses is held on the infraction. 2RP 200. If the hearings officer decides that the misconduct reported in the infraction actually occurred, the *hearings officer* can then assign discipline or remove privileges from the inmate. 2RP 201. Thus, a line officer does not have authority to decide the conditions of an inmate's sentence or supervision.

"In the absence of a contrary statutory definition, words contained in a statute or ordinance should be construed in accordance with their general dictionary definition." State v. Sullivan, 143 Wn.2d 162, 185-86, 19 P.3d 1012 (2001). "Influence"

is defined as: “Power exerted over others. To affect, modify or act upon by physical, mental or moral power, especially in some gentle, subtle, and gradual way.” Black’s Law Dictionary, (6th ed. 1990). It is also defined as “the power to shape policy or ensure favorable treatment from someone, especially through status, contacts, or wealth.” New Oxford American Dictionary (2012). According to Ms. Piukkula, a correctional line officer does not have direct power over an inmate—that power is reserved for the unit sergeant (who decides when a cell is searched, whether force can be used to subdue an inmate, and whether immediate detention in solitary is necessary) and the hearings officer (who decides disciplinary matters and assigns punishment). See 2RP 198 – 201.

A line officer can essentially make a complaint that will begin a process that may end with discipline being imposed. But merely making a complaint or report is not clearly within the meaning of “ability to influence” because the line officer does not have direct power over the inmate. This leaves a person guessing as to whether a line officer meets the statute’s definition.

While the State below argued and the trial court found that the legislative history was determinative on this issue,³ the court is to look to legislative history only if a statute is ambiguous. State v. Alphonse, 142 Wn. App. 417, 425-26, 174 P.3d 684 (2008); State v. Fisher, 139 Wn. App. 578, 583, 161 P.3d 1054 (2007). Thus, where, as here, the statute is so vague that it leaves the ordinary person to “speculate as to the meaning” at the “peril of their liberty,” the legislative intent cannot save it from being invalidated under the constitution.

The State and federal constitutions impose on the Legislature the duty to set forth statutes with specificity. State v. Richmond, 102 Wn.2d 242, 248, 683 P.2d 1093 (1984). The Legislature has failed to do so with RCW 9A.44.160. This statute is unconstitutionally vague and therefore Mr. Clapper’s conviction must be reversed.

³ 1RP 71-72.

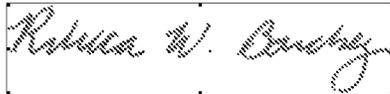
D. CONCLUSION

RCW 9A.44.160 is unconstitutionally vague because an ordinary person could not determine whether the undefined term “the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision” applies to a correctional line officer with no authority to make decisions about an inmate’s privileges or punishments. Therefore, Mr. Clapper’s conviction for custodial sexual misconduct must be reversed.

DATED: September 4, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A rectangular box containing a handwritten signature in cursive script, which appears to read "Rebecca Wold Bouchey".

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