Supreme Court

State :
:
v. : No. 79-65-C.A.
:
Idalio Santos. :

O P I N I O N

DORIS, J. This is an appeal from a Superior Court judgment of conviction wherein Idalio Santos (defendant), was adjudged guilty of transporting for immoral purposes and of committing an abominable and detestable crime against nature. The defendant now claims that the trial justice deprived him of his right to a public trial, admitted into evidence the fruits of an illegal search and seizure, improperly sustained his own objections to questions asked by defense counsel, and erroneously admitted into evidence hearsay statements concerning the defendant's prior bad acts. Additionally, the defendant challenges the constitutionality of the statutes under which he was convicted, alleging that they are vague and infringe upon his right of privacy. We reject the defendant's arguments and affirm the judgment of the Superior Court.

On December 30, 1977, the complainant went to the Rustic Pub in Swansea, Massachusetts, to meet her sister and some friends. While there, she met defendant, with whom she talked and danced from about 10 p.m. to 1 a.m. when the establishment closed. The

complainant extended, and defendant accepted, an invitation to accompany her to a New Year's Eve party to held at her sister's home the following evening. Before leaving the Rustic Pub, she and defendant agreed to meet for coffee at a nearby Howard Johnson's restaurant in Swansea. The complainant parked her car in the front lot of the restaurant and defendant parked his car in the larger lot behind the building. While at the restaurant, they discussed the party, exchanged phone numbers and addresses, and then left at approximately 1:30 a.m.

As they left the building, they walked to the rear parking lot. The complainant testified that after they had reached defendant's car and had said goodnight, defendant grabbed her and refused to let her go. In response to her efforts to loosen his grasp, defendant told her to be quiet and to avoid a scene. The defendant further told the complainant that he did not care if he was hurting her and that he had a knife which he would use if he had to. The defendant then ordered her to get into his car. The complainant, though she never saw the knife, testified that she entered the car because she was afraid defendant would hurt her.

The defendant entered the car immediately after the complainant, and they drove to a secluded area in Bristol, Rhode Island. The defendant then ordered her to get into the rear seat of the car where he first had sexual intercourse and then anal intercourse with her. The complainant testified that she was too

afraid to resist defendant other than by unsuccessfully attempting to push him away.

At approximately 4 a.m., both parties dressed and they returned to the Howard Johnson's parking lot. The complainant testified that as they left Bristol, defendant asked her whether she intended to complain that he had raped her because two other women had previously done so. She further testified that when they arrived at the restaurant parking lot, defendant again asked whether she would say she had been raped or had willingly had sex.[1] The complainant then left defendant's car and, after resting in her car for a short time, drove to her home in Somerset, Massachusetts. Later that morning she called the Swansea Police Department and, after talking with a police officer, went to a hospital for an examination. The following day the complainant met with members of the Rhode Island State Police and showed them the location in Bristol where defendant had taken her.

On January 1, 1978, members from the police departments of Fall River and Somerset, Massachusetts, went to defendant's apartment in Fall River and arrested him. The defendant told the arresting officers that the complainant had consented to everything they had done together. He further said that he could not understand why women let him make love to them and then accused him of rape, and that this was the third time he had been so

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1 The trial justice cautioned the jurors that they could use the testimony only as evidence that defendant had spoken to her while they were in the car.

accused. On January 2, 1978 the police searched defendant's car, which they had previously seized, at the Somerset Police Department and discovered a knife in the glove compartment.

The defendant was subsequently tried in the Superior Court on four counts: rape, the abominable and detestable crime against nature, kidnapping, and transporting for immoral purposes. After calling the complainant as its first witness, the state moved to clear the courtroom of all spectators during her testimony. Counsel for defendant objected, arguing that the complainant was not of tender years and therefore should testify in open court. The trial justice, however, ordered the courtroom cleared of all spectators, stating that the exclusion did not deprive defendant of his right to a public trial. The trial justice, relying on the opening statement of counsel and the facts to be elicited during the complainant's testimony, held that it would be in the best interests of all parties to exclude the spectators from the courtroom.

The complainant then testified, identifying defendant as her assailant and relating what had transpired on the evening of December 30, 1977. After the complainant repeated defendant's statement that two other women had previously accused him of rape, the trial justice instructed the jury that he had admitted the testimony only to show that the conversation occurred and that the jurors should not consider her testimony as evidence that other

rapes had actually happened. Similarly, after the police officers testified that defendant had told them that this was the third time women had claimed that he raped them, the trial justice instructed the jury that they could consider the testimony only as evidence of defendant's state of mind.

At the conclusion of the trial, defense counsel requested instructions that consent could be raised as a defense to the abominable and detestable crime against nature. The trial justice instructed the jury that consent was not relevant either to that charge or to the transporting charge. The jury then returned its verdict, acquitting defendant of the rape and kidnapping charges and convicting him of transporting for immoral purposes and committing an abominable and detestable crime against nature. From these judgments of conviction defendant now appeals.

The defendant first claims that the exclusion of all spectators from the courtroom during the testimony of the complainant deprived him of his right to a public trial. Although the right to a public trial is fundamental, it is not a "limitless imperative" of a criminal defendant. United States ex rel. Smallwood v. LaValle, 377 F. Supp. 1148, 1151 (E.D.N.Y. 1974). As we have previously noted, the right is subject to "a court's inherent power to regulate admission to the courtroom and to restrict attendance at the trial as conditions and circumstances may reasonably demand in order to preserve order and decorum, or to protect the rights of the parties and the witnesses, or generally

to further the administration of justice." State v. Mancini, 108 R.I. 261, 271-72, 274 A.2d 742, 747 (1971). A trial justice thus has the discretion to exclude spectators from the courtroom in certain circumstances, including when necessary to protect a witness from the embarrassment or emotional pressures that often result when a victim must relate the details of a lurid crime in open court. United States ex rel. Orlando v. Fay, 350 F.2d 967, 971 (2d Cir. 1965); United States ex rel. Smallwood v. LaValle, 377 F. Supp. 1148, 1151 (E.D.N.Y. 1974); People v. Jelke, 308 N.Y. 56, 63, 123 N.E.2d 769, 772 (1954); Commonwealth v. Knight, 469 Pa. 57, 66-68, 364 A.2d 902, 906 (1976).

When fashioning an exclusion order to alleviate a witness's embarrassment or emotional trauma, a trial justice has more latitude than if he were closing the courtroom for another reason. Accordingly, if necessary the trial justice may exclude some or all spectators during the witness's testimony. United States ex rel. Smallwood v. LaValle, 377 F. Supp. at 1151; Commonwealth v. Knight, 469 Pa. at 68, 364 A.2d at 908. The trial justice remains obliged, however, to strike an acceptable balance between the accused's right to a public trial and the need to protect the witness, paying particular attention that neither the scope nor the duration of the order violates the rights of an accused. Commonwealth v. Knight, 469 Pa. at 66, 364 A.2d at 906. The duration of the order is an especially important factor.

United States ex rel. Smallwood v. LaValle, 377 F. Supp. at 1151; Butler v. Smith, 416 F. Supp. 1151, 1154 (S.D.N.Y. 1976). If the exclusion order is necessary and the trial justice has limited its duration to that minimally required to protect the testifying witness, there is no denial of a public trial, even if the court excludes all spectators. The temporary exclusion of all spectators is permissible when, as here, a witness must testify to the details of a sexual assault. Because the trial justice limited the exclusion order to the testimony of the victim, it did not, as defendant Santos claims, totally deprive him of his right to a public trial.

The defendant also contends that the trial justice lacked sufficient reason to close the courtroom because the witness had exhibited no signs of emotional disturbance while on the stand. Whether an exclusion order is warranted depends on the circumstances presented in each case. Commonwealth v. Knight, 469 Pa. at 66, 364 A.2d at 906. The need to close the courtroom will often be acute when, because the witness is young, emotionally upset, or the victim of a sex crime, he cannot bring himself to testify in open court. Commonwealth v. Stevens, 237 Pa. Super. Ct. 457, 352 A.2d 509 (1975); 3 Wharton, Criminal Procedure § 439 at 222-25 (12th ed. 1975). Because of the concern for the defendant's right to a public trial, the trial justice should exercise his power sparingly and should exclude the public only when

necessary to enable the witness to testify fully and accurately. United States ex rel. Smallwood v. LaValle, 377 F. Supp. at 1152. The trial justice need not, however, wait until the witness breaks down on the stand before issuing an exclusion order. Such a requirement would unnecessarily subject the witness to the sort of emotional trauma that the exclusion of spectators is intended to avoid. Commonwealth v. Knight, 469 Pa. at 67, 364 A.2d at 907. A trial justice may properly order the public from the courtroom if, in light of the nature of the crime, the expected testimony, or the emotional state of the witness, he has determined that the testimony would likely be severely hampered or distorted if the witness were required to testify in public. See Commonwealth v. Stevens, 237 Pa. Super. Ct. at 468, 352 A.2d at 515 (not unreasonable for trial court to find testimony hampered if courtroom not cleared).

Here, the trial justice issued the exclusion order on the basis of the opening statements of counsel and the nature of the testimony to be elicited from the complainant. The justice ruled that it would be in the best interest of all parties to close the courtroom during the young woman's testimony. The age and experience of the witness, though important factors in deciding whether to exclude the public, are not controlling. Commonwealth v. Stevens, 237 Pa. Super. Ct. at 467-68, 352 A.2d at 514-15. Accordingly though the complainant was twenty-two years old at the time of trial, the trial justice was not precluded from finding that she

would be subject to the same sort of emotional stress while testifying as would hinder the testimony of a younger witness. In light of the lurid nature of the crimes about which the complainant testified, it was reasonable for the trial justice to conclude that she would be able to relate her testimony to the jurors only in the absence of court spectators. We therefore find that the trial justice acted properly in closing the courtroom for the limited purpose of ensuring that the complainant would testify as accurately and under as little emotional stress as was possible.

The defendant also challenges the constitutionality of the statutes under which he was convicted, G.L. 1956 (1969 Reenactment) §§ 11-10-1 and 11-34-5, arguing that they are impermissibly vague and deprive him of his constitutional right of privacy. As a corollary of this argument, defendant urges this court to recognize a right of privacy that would prevent the state from making criminal the private sexual relations between consenting adults. We decline to do so.

The constitutional requirement that criminal statutes be precisely drawn prevents a state from prosecuting anyone under a penal statute that does not give a person of ordinary intelligence fair notice that his conduct is unlawful. United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989, 996 (1954); State v. Levitt, 118 R.I. 32, 36, 371 A.2d 596, 598 (1977). The rationale for this requirement is that no one may "be held criminally

responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. at 617, 74 S. Ct. at 812, 98 L. Ed. at 996. As this court has recently noted, however, the language of a statute challenged on vagueness grounds must be interpreted in light of its "common law meaning, its statutory history and prior judicial interpretations of its particular terms." State v. Levitt, 118 R.I. at 36, 371 A.2d at 598; see Wainwright v. Stone, 414 U.S. 21, 22-23, 94 S. Ct. 190, 192, 38 L. Ed. 2d 179, 182 (1973) (per curiam) (claims of vagueness must be judged in light of judicial interpretations of statute). We need look no further than our previous opinions to resolve defendant's vagueness argument.

This court has previously had the opportunity to examine §§ 11-10-1 and 11-34-5 and has upheld each statute against a vagueness challenge. In State v. Milne, 95 R.I. 315, 187 A.2d 136 (1962), a defendant convicted of receiving a person into his room for the purpose of performing fellatio, alleged that § 11-34-5, by virtue of its vague and indefinite description of the proscribed conduct, deprived him of his right to due process under both the state and federal constitutions. Prior to resolving the vagueness issue, the Milne court discussed the legislative purpose in enacting Title 11 and found that its provisions evinced an intent "to proscribe all natural copulation that takes place outside of the marriage status." Id. at 321, 187 A.2d at 139. Interpreting

§ 11-10-1 in this light, the court found that it necessarily proscribed all unnatural sexual copulation. Id., 187 A.2d at 139. The court rejected the argument that had the Legislature intended to make fellatio unlawful, it would have done so explicitly in § 11-10-1. Instead, the court presumed that the Legislature had eschewed a statutory enumeration so as not to limit the statute to the matters enumerated. Id., 187 A.2d at 140. The court reasoned that the Legislature had purposely chosen the term "crime against nature" to achieve a degree of comprehensiveness that would not have been possible with an enumeration. The court then held that fellatio was criminal under § 11-10-1 and, accordingly, was an indecent act within the meaning of § 11-34-5. Id. at 322, 187 A.2d at 140.

The court employed similar reasoning in holding that the term "indecent act," as used in § 11-34-5, possessed the degree of certainty required by the constitution. Emphasizing the impracticability of establishing "rigid legislative criteria" when dealing with sex crimes, the court stated that a reasonable certainty in regard to the conduct proscribed was all that the statute need provide. The court noted the near impossibility of describing all means by which one could violate § 11-34-5 and concluded that when the statutory language "is as specific as the subject matter reasonably permits, the constitutional requirement is satisfied." State v. Milne, 95 R.I. at 323, 187 A.2d at 140.

As it had done in construing § 11-10-1, the court reasoned that the Legislature, by using the language "indecent act" had intended to give the statute a broad meaning and "to avoid the exclusory effect" that might have resulted had it attempted to enumerate the acts proscribed. Id. at 323-24, 187 A.2d at 141. So construing § 11-34-5, the court held that it was intended to bar all unlawful sexual conduct, whether natural or unnatural, including the act of fellatio. Accordingly, the term "indecent act" was sufficiently specific to satisfy the constitutional requirement of definiteness for criminal statutes. Id. at 324, 187 A.2d at 141.

This court again considered the meaning of § 11-10-1 in State v. Levitt, 118 R.I. 32, 371 A.2d 596 (1977), wherein a defendant charged with forcing a woman to perform fellatio on him argued that the term "abominable and detestable crime against nature" was impermissibly vague. In examining the interpretive case law, we found State v. Milne, 95 R.I. 315, 187 A.2d 136 (1962), dispositive and therefore placed no merit in that defendant's vagueness claim. We held that the statute as construed provided fair notice to defendant that his conduct was unlawful. State v. Levitt, 118 R.I. at 36, 371 A.2d at 598-99.

Viewing both §§ 11-10-1 and 11-34-5 in light of Milne and Levitt, as we are required to do, we see no reason to find either statute unconstitutionally vague as applied to defendant Santos.

In construing § 11-10-1 in Levitt, we found Milne dispositive of the vagueness claim because it "provided specificity to what otherwise might [have been] considered an ambiguous criminal statute, [and] fixed its meaning for subsequent cases * * *." State v. Levitt, 118 R.I. at 36, 371 A.2d at 598. Although Milne concerned a prosecution for an act of fellatio, our construction of § 11-10-1 was not, as defendant argues, limited to the inclusion of that act within the terms of the statute. As we clearly stated in Milne, the legislative intent in enacting § 11-10-1 was to proscribe "all unnatural sexual copulation." State v. Milne, 95 R.I. at 321, 187 A.2d at 139. The act of anal intercourse for which defendant Santos was convicted, being an act of "unnatural sexual copulation," was clearly proscribed by § 11-10-1, as construed by Milne. Santos, therefore, may not complain that the statute did not provide fair warning that his conduct was proscribed. See Wainwright v. Stone, 414 U.S. 21, 22-23, 94 S. Ct. 190, 192, 38 L. Ed. 2d 179, 182 (1973); State v. Levitt, 118 R.I. at 36-37, 371 A.2d at 598-99 (statute read in light of prior judicial interpretations).

In Milne, we held that the term "indecent act," as used in § 11-34-5, was sufficiently definite to satisfy the constitutional requirement of certainty. The defendant Santos was convicted under another part of this statute which made it unlawful to transport

a person for the purpose of any "lewd or indecent act."[2] Although Milne did not construe the part of the statute now before us, the language in each part is nearly identical; and there is no reason for us to construe "lewd or indecent act" any differently than we construed the term "indecent act" in Milne. For the reasons stated in Milne, therefore, defendant's vagueness claim regarding § 11-34-5 is without merit.

The defendant further asserts that §§ 11-10-1 and 11-34-5 are unconstitutional because they violate his right of privacy under the state and federal constitutions. Neither party has briefed the issue of defendant's standing to raise this argument. In order to reach the merits of the privacy claim, we shall assume, without deciding, that defendant has standing.

There is no right of privacy explicitly mentioned in either the Rhode Island or the federal constitution. The Supreme Court of the United States, however, has recognized a right of personal privacy derived from certain guarantees of the Bill of Rights. Though the Supreme Court has yet to establish definitively the extent of this right, it is clear that the right of privacy insulates certain fundamental personal decisions from government interference.

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2 General Laws 1956 (1969 Reenactment) § 11-34-5 provides in part:

> "'It shall be unlawful for any person to * * * transport * * * another for the purpose of prostitution, or for any other lewd or indecent act; * * *."

To date, the Supreme Court has dealt with the right of privacy primarily in the context of personal decisions regarding contraception and abortion. The Court first enunciated the constitutional right of privacy in Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), wherein the Court invalidated a statute proscribing the use of contraceptives.[3] The Griswold Court reasoned that penumbras emanating from the specific guarantees of the Bill of Rights gave those guarantees life and substance and created a zone of privacy that protects the individual from governmental interference. Stating that the marital relationship was within the zone of privacy and that the enforcement of the statute would be "repulsive to the notions of privacy surrounding the marriage relationship," the Court held the statute unconstitutional. Griswold v. Connecticut, 381 U.S. at 485-86, 85 S. Ct. at 1682, 14 L. Ed. 2d at 515-16.

The Court has since established that the right of privacy is not confined solely to the marital relationship. Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972). The Eisenstadt Court upheld a District Court order issuing a writ

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3 The challenged statute provided:

> "Any person who uses any drug, medicinal article or instrument for the purpose of preventing contraception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." Conn. Gen. Stat. Ann. § 53-32 (West 1960) (repealed 1969 Conn. Pub. Acts 828 § 214).

of habeas corpus to a person convicted under a Massachusetts statute prohibiting the unlicensed distribution of contraceptives.[4] Viewing the statute as a prohibition of contraception per se, the Court found that it violated the rights of unmarried persons under the equal protection clause of the Fourteenth Amendment. The Court reasoned that the right of access to contraceptives, whatever right it may be, must be the same for married and unmarried persons alike.

Although resting its decision on equal protection grounds, the Court also explicated the right of privacy, stating that the right was not confined to the marital relationship. Acknowledging that in Griswold the right to privacy had inhered in the marital relationship, the Court reasoned that the marital couple was not simply an independent entity but an association of separate individuals. Elaborating, the Court stated that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. at 453, 92 S. Ct. at 1038, 31 L. Ed. 2d at 362.

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4 Massachusetts General Laws Ann. ch. 272 § 21A (West 1970).

The Supreme Court has subsequently made clear that the right of privacy is not so inclusive as the language in Eisenstadt might make it appear. In Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the Court considered whether a Texas criminal statute that permitted abortions only when necessary to save the life of the mother infringed the right of privacy.[5] Summarizing its prior decisions, the Court stated "that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' * * * are included in this guarantee of personal privacy." Roe v. Wade, 410 U.S. at 152, 93 S. Ct. at 726, 35 L. Ed. 2d at 176 (quoting Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937). The Court further stated that its prior opinions had established that the right of privacy applied to activities concerning marriage, procreation, contraception, family relationships and child rearing and education. Id. at 152, 93 S. Ct. at 726, 35 L. Ed. 2d at 176-77.[6]

In a recent opinion, the Supreme Court ruled unconstitutional on privacy grounds a New York statute making criminal the unauthorized sale or distribution of contraceptives.[7] In Carey v. Population

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5 Texas Penal Code Ann. arts. 1191-1194, 1196 (Vernon 1961).

6 Expressing its belief that the basis of the right to privacy was the "concept of personal liberty and restrictions upon state action" that inhere in the Fourteenth Amendment, the Court held that the right was sufficiently broad to include a woman's decision whether or not to have an abortion. Roe v. Wade, 410 U.S. 113, 153, 93 S. Ct. 705, 727, 35 L. Ed. 2d 147, 177 (1973).

7 New York Educ. Law § 6811(8) (McKinney 1972).

Services International, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977), the Court reiterated its earlier statements that one aspect of the liberty protected by the due process clause of the Fourteenth Amendment is a right of personal privacy which includes an interest in independence in making certain kinds of important decisions. Id. at 684, 97 S. Ct. at 2016, 52 L. Ed. 2d at 684 (quoting Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977)). The Court stated that although the outer limits of the protection afforded to individual decision making were not yet defined, decisions relating to marriage, contraception, procreation, and family relationships clearly were protected. In striking down the statute, the Court considered only the individual's decision whether or not to have a child, characterizing it as "among the most private and sensitive" that a person could make. The Carey Court reserved judgment on whether, and the extent to which, a state could regulate private consensual sexual relations between adults. Id. at 688 n.5, 694 n.17, 97 S. Ct. at 2018 n.5, 2021 n.17, 52 L. Ed. 2d at 687 n.5, 691 n.17.

The language in Eisenstadt forbidding unwarranted governmental interference in matters as fundamental as the decision to have a child suggests that unmarried adults may be entitled to similar protection in their decision about whether to engage in private consensual sexual conduct. Indeed, a few state courts have expanded the right of privacy to encompass private consensual sexual

relations between adults. State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (sodomy statute unconstitutional on privacy grounds as applied to consenting adults of opposite sex); State v. Saunders, 75 N.J. 200, 214, 381 A.2d 333, 339-40 (1977) (fornication statute infringes right of privacy). But see State v. Callaway, 25 Ariz. App. 267, 542 P.2d 1147 (1975) (right of sexual privacy between consenting adults fundamental), rev'd sub nom. State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976), cert. denied, 429 U.S. 864, 97 S. Ct. 1, 50 L. Ed. 2d 32 (1977); State v. Elliot, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975) (application of sodomy statute to private consensual acts between adults unconstitutional), rev'd, 89 N.M. 305, 551 P.2d 1352 (1976); In re P., 92 Misc. 2d 62, 76, 400 N.Y.S.2d 455, 465 (Fam. Ct. 1977) (right of privacy protects "private, intimate consensual sexual conduct not harmful to others"), rev'd sub nom. In re Dora P., 68 App. Div. 2d 719, 418 N.Y.S.2d 597 (1979).

If read alone, the language of Eisenstadt is susceptible of such an interpretation. We believe, however, that the parameters of the right of privacy can be better ascertained by viewing Griswold and its progeny collectively. In doing so, we find that the right of privacy is closely related to the decision whether or not to have a child. Though the Eisenstadt Court broadly construed the right of privacy, the Roe Court subsequently employed a narrower construction. In Roe, the Court stated that only those

personal rights that are "'fundamental'" or "'implicit in the concept of ordered liberty'" are protected by the right of privacy. Roe v. Wade, 410 U.S. at 152, 93 S. Ct. at 726, 35 L. Ed. 2d at 176 (quoting Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937)). The Roe Court included within the concept of privacy, activities that relate to marriage, procreation, contraception, and family relationships. Id. at 152, 93 S. Ct. at 726-27, 35 L. Ed. 2d at 176-77. The claimed right of an adult to engage in any sort of private consensual sexual conduct relates to none of these matters. Although such acts may be conducted in the utmost privacy, they are not for that reason alone entitled to the degree of protection the right of privacy confers on decisions regarding the use of contraceptives or the termination of a pregnancy. The latter decisions are inextricably linked to "the decision whether to bear or beget a child," Eisenstadt v. Baird, 405 U.S. at 453, 92 S. Ct. at 1038, 31 L. Ed. 2d at 362, and it is this decision that underlies the holdings of the Supreme Court in Griswold, Eisenstadt, and Roe. Carey v. Population Services International, 431 U.S. at 688-89, 97 S. Ct. at 2018, 52 L. Ed. 2d at 687. Notwithstanding the opinions of some state courts to the contrary, we do not believe that the decision of an unmarried adult to engage in private consensual sexual activities is of such a fundamental nature or is so "'implicit in the concept of ordered liberty'" to warrant its inclusion in the guarantee of personal

privacy. Roe v. Wade, 410 U.S. at 152, 93 S. Ct. at 726, 35 L. Ed. 2d at 176 (quoting Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937)). In rejecting defendant Santos' claim that G.L. 1956 (1969 Reenactment) §§ 11-10-1 and 11-34-5 infringe his right of privacy, we find persuasive the recent decisions in which the Supreme Court has declined to give the right a more expansive reading.

In Carey the Court reiterated what it had said in Roe, stating that Griswold and its progeny had established that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." 431 U.S. at 687, 97 S. Ct. at 2018, 52 L. Ed. 2d at 686. Although the question whether the right of privacy protects the private consensual sexual conduct of adults had been raised in Carey, the Court found it unnecessary to reach that issue. Id. at 694 n.17, 97 S. Ct. at 2021 n.17, 52 L. Ed. 2d at 691 n.17. Instead, the Court emphasized the interrelationship between the right of privacy and the "right of decision in matters of childbearing" in striking down the statute. Id. at 688-89, 97 S. Ct. at 2018, 52 L. Ed. 2d at 687.

In a decision prior to Carey, the Supreme Court declined to extend the right of privacy to sexual matters not related to childbearing. The Court summarily affirmed a District Court judgment that upheld a Virginia sodomy statute against a privacy challenge. Doe v. Commonwealth's Attorney, 425 U.S. 901, 96 S. Ct. 2192, 48

REPORTED

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IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 655

September Term, 1979

HOWARD CHESTER KELLY, JR.

v.

STATE OF MARYLAND

Thompson
Couch
MacDaniel,

JJ.

OPINION BY THOMPSON, J.

Filed: April 10, 1980

Appellant's major contention on appeal is that his conviction under Md. Code, Art. 27, § 554 for unnatural or perverted sexual practices is an unconstitutional infringement of his right to privacy.[1] He also argues he was denied equal protection, and subjected to cruel and unusual punishment.[2]

The prosecutrix testified at the time of the trial that she was abducted at knifepoint on the parking lot of Harundale Mall in Anne Arundel County, Maryland on the afternoon of May 5, 1978, by two young men, appellant Howard Chester Kelly, Jr., and his friend, Ronald Holden. It was her testimony that she was driven, against her will, to a secluded area, an abandoned missile site in Anne Arundel County, where she was assaulted, raped and forced to engage in fellatio. According to the prosecutrix, at the conclusion of the sexual encounter the defendant abandoned her at the missile site. She wandered to a nearby house saying she was "dumped"; the lady of the house called the police. Later the same afternoon the appellant was arrested.

At the time of trial, the appellant and his friend each took the

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[1] Art. 27, § 554 in pertinent part reads as follows:

"§554. Unnatural or perverted sexual practices.

"Every person who is convicted of taking into his or her mouth the sexual organ of any other person or animal, or who shall be convicted of placing his or her sexual organ in the mouth of any other person or animal, or who shall be convicted of committing any other unnatural or perverted sexual practice with any other person or animal, shall be fined not more than one thousand dollars ($1,000.00), or be imprisoned in jail or in the house of correction or in the penitentiary for a period not exceeding ten years, or shall be both fined and imprisoned within the limits above prescribed in the discretion of the court.

[2] Appellant claims both the Constitution of the United States and the Constitution of Maryland were violated; his arguments, however, are based on alleged violations of the federal constitution. We will so limit our opinion.

stand and testified, admitting that Holden had had sexual intercourse with the prosecutrix and that she had performed fellatio on each of them a number of times. They testified that the entire episode was at the prosecutrix's urging and initiative. According to the defendants, they and the prosecutrix had spent time together that afternoon in a pool hall at Jumpers Mall. It was at the suggestion of the prosecutrix, who claimed that she used to live in the area, that they drove to the abandoned missile site. They testified that after arriving at the missile site, the prosecutrix was an eager and willing participant in all sexual activities that took place, and that all that had occurred was with her consent.

The jury found appellant not guilty on all counts of the indictment in which force or threat of force was an element, but found him guilty under count six, "Perverted Sexual Practices." The constitutional questions raised here were properly preserved in appropriate objections to the instructions, as well as otherwise. Judge Raymond G. Thieme, Jr., sitting in the Circuit Court for Anne Arundel County, imposed a sentence of one year which was suspended. A three year period of probation was imposed.

The Supreme Court has recognized that the right of privacy may be constitutionally protected in e.g., Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). The issue in the present case is whether the right of privacy applies to the type of conduct prohibited by § 554. In Carey

v. Population Services, supra, the Supreme Court, in its most recent case interpreting the right to privacy, stated that the Court had not answered the question to what extent the Constitution prohibits the state from regulating private consensual sexual behavior among adults. 431 U.S. at 688, n. 5, 97 S.Ct. at 2018. Thus far, the right to privacy has been held by the Court to apply to the marital relationship; Griswold, supra, the right of individuals to decide whether to bear children; Eisenstadt v. Baird, supra, and the decision whether to terminate pregnancy; Roe v. Wade, supra. For a summary of other cases where the Court said that privacy applies, see, Carey, supra, 431 U.S. at 685, 97 S.Ct. at 2016.

In Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd. mem., 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), petitioners challenged the constitutionality of a Virginia sodomy statute as applied to adult male consensual conduct. In analyzing whether the Constitution prohibited such a statute, the District Court concluded that since sodomy "is obviously no portion of marriage, home or family life," the state could appropriately punish sodomy in the promotion of morality and decency. 403 F. Supp. at 1202. The Supreme Court affirmed this decision in a Memorandum Opinion. Insofar as a Memorandum Opinion is authority, it appears from our brief analysis of recent Supreme Court decisions that the right of privacy does not protect the perverted sex practice of which appellant was convicted in the present case. The rule that the right to privacy does not invalidate statutes prohibiting consensual sexual practices is supported by most other courts that have

considered the question.[3]

The majority rule has received the support of this Court in dicta. In Hughes v. State, 14 Md. App. 497, 287 A.2d 299, cert. denied, 409 U.S. 1025, 93 S.Ct. 469, 34 L.Ed.2d 317 (1972), this Court found that the accused had no standing to challenge the constitutionality of the perverted sex practices statute as a consenting adult when he had indulged in the practice with a minor. The Court stated:

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[3] See, Doe v. Commonwealth, supra, State v. Bateman, 113 Ariz. 107, 547 P.2d 6, cert. denied, 429 U.S. 864 (1976); Carter v. State, 255 Ark. 225, 500 S.W. 2d 368 (1973), cert. denied, 416 U.S. 905 (1974); Dixon v. State, 256 Ind. 266, 268 N.E.2d 84 (1971); Hughes v. State, 14 Md. App. 497, 287 A.2d 299, cert. denied, 409 U.S. 1025, 93 S.Ct. 469, 34 L.Ed.2d 317 (1972); State v. Elliott, 89 N.M. 305, 551 P.2d 1352 (1976); Washington v. Rodriguez, 82 N.M. 428, 483 P.2d 309 (1971); People v. Mehr, 87 Misc.2d 257, 383 N.Y.S.2d 798 (1976); and People v. Rice, 87 Misc.2d 257, 383 N.Y.S.2d 799 (1976), aff'd. 41 N.Y.2d 1018, 363 N.E.2d 1371, 395 N.Y.S.2d 626 (1977); State v. Poe, 40 N.C. App. 345, 252 S.E.2d 843 (1979); Canfield v. State, 506 P.2d 987 (Okla. Crim. App. 1973 appeal dismissed, 414 U.S. 991, 94 S.Ct. 342 (1973), reh. denied, 414 U.S. 1138, 94 S.Ct. 884 (1974); Pruett v. State, 463 S.W.2d 191 (Tex. Crim. App. 1970), appeal dismissed, 402 U.S. 902, 91 S.Ct. 1379, reh. denied, 403 U.S. 912, 91 S.Ct. 2203 (1971); State v. Rhinehart, 70 Wash. 2d 649, 424 P.2d 906, cert. denied, 389 U.S. 832 (1967).

But see, Cotner v. Henry, 394 F.2d 873 (7th Cir.), cert. denied, 393 U.S. 847 (1968); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), vacated on other grounds 401 U.S. 989, 91 S.Ct. 1221, 28 L.Ed. 2d 526 (1971); State v. Pilcher, ___ Io. ___, 242 N.W.2d 348 (1976); Commonwealth v. Balthazar, 366 Mass. 298, 318 N.E.2d 478 (1974); People v. Howell, 395 Mich. 16, 238 N.W.2d 148 (1976); State v. Ciuffini, 164 N.J. Super. 145, 395 A.2d 904 (1978); New York v. Onofre, 48 U.S.L.W. 2520 (Feb. 12, 1980)(N.Y. Sup. Ct., App. Div. 4th Dept.).

See also, Lovisi v. Slayton, 539 F.2d 349 (4th Cir.), cert. denied, 429 U.S. 977 (1976); State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977); People v. Jose L., ___ Misc.2d ___, 417 N.Y. Supp.2d 655 (1979); Tribe, American Constitutional Law, § 15-13 (1978); Craven, Personhood: The Right to Be Let Alone, 1976 Duke Law J. 699 (1976); Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 Fordham L. Rev. 1281 (1977); Wilkinson and White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563 (1977); Note on Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U. L. Rev. 670 (1973); Annot. 58 A.L.R.3d 636 (1974).

"Nothing we have said in determining that Hughes had no standing to contest the constitutionality of the statute is to be construed as implying that we believe that the statute is unconstitutional as to adults, married or unmarried, consenting to the acts proscribed. We shall decide that question when it is properly presented to us. We observe, however, that although it is conceivable that a husband and wife could be convicted under § 554 even though the evidence established that the act was committed with the consent of both parties, we think it unlikely. We are not aware of a case in this jurisdiction where a husband or wife was convicted of the offense. If the acts were in private there would be no witnesses, and if consensual the parties would be equally guilty. Their testimony as witnesses would then require corroboration. Early v. State, 13 Md App. 182. And of course, neither the husband nor the wife would be a compellable witness against the other. Code, Art. 35,§ 4. Mr. Justice Douglas, speaking for the Court in Griswold v. State of Connecticut, 381 U.S. 479, said, at 486:

> 'We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.'

We share the sentiments of the court in Pruett v. State, 463 S.W.2d 191, 195 (Texas 1970) that to extend the protection of this right of privacy of the marital union to strike down a statute proscribing cunnilingus, fellatio, and the whole field of other unnatural or perverted sexual practice, when successful prosecution of private consensual sexual acts between married couples are at most only 'conceivable', is not consistent with the description of the marriage relationship and right of privacy described by Mr. Justice Douglas." 14 Md. App. at 503-05. (footnotes omitted).

We are not persuaded to change the rule and invalidate a legislative prohibition against sodomy, in the absence of a clear lead from the Supreme Court of the United States or from the Court of Appeals of Maryland. We are especially reluctant to invalidate a crime of such ancient vintage. Sodomy was prohibited by Acts of 1793, Chapter 57,

Sec. 10. See also Exodus 22:19, Leviticus 18:22-23, and Deuteronomy 23:17.

Appellant argues that inasmuch as fornication is not prohibited by Maryland law, persons indulging in private, consensual acts of sodomy are denied equal protection of the law. The argument is that there is no essential difference between vaginal intercourse and other sex acts. He also argues that any punishment for sodomy is cruel and unusual. Once again we repeat, we will not invalidate laws of such ancient vintage without clear authority from higher courts..

JUDGMENT AFFIRMED.
APPELLANT TO PAY THE COSTS.

Harry Hazelwood, Jr. of Newark, for the term prescribed by law.

Edward F. Neagle, Jr. of Livingston, for the term prescribed by law.

Benedict E. Lucchi of Teaneck, for the term prescribed by law.

The following nominees will be considered:

TO BE A MEMBER OF THE GOVERNOR'S ADVISORY COUNCIL ON TRAVEL & TOURISM:

Mildred Fox of Atlantic City, for the term prescribed by law.

TO BE A MEMBER OF THE ADVISORY BOARD, CARNIVAL AMUSEMENT RIDE SAFETY:

Carl Ekholm of Lambertville, to succeed Blanche Hoffman, resigned, for the term prescribed by law.

Other nominations may be added:

In addition to the above nominations, the following bills will be considered:

S-221, Feldman - Prescribes the procedure for the appointment of conservators for persons unable to manage their affairs.

S-1020, DiFrancesco - To amend the law to permit the granting of temporary alimony, for a specific period of time, to provide rehabilitation to the parties to encourage self-support.