State of Wisconsin: Circuit Court: Milwaukee County:

State of Wisconsin,

Plaintiff,

v. Case No. 2007CF002386

Terrell Jefferson,

Defendant.

Motion to Declare Sec. 948.02(1), Stats Unconstitutional as Applied to Jefferson

Now comes the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves the court to declare Sec. 948.02, Stats., unconstitutional as applied to the defendant, Terrell Jefferson, for the reasons that (1) the statute is over-broad in that its proscription includes persons whom the legislature intended to be protected (i.e. children who engage in sexual conduct); and, (2) the statute as applied to Jefferson violates the equal protection clause because the prosecutor made her charging decision based upon gender.

This motion is based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008:

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Memorandum of Law

Introduction

The defendant, Terrell Jefferson ("Jeffersonl") was originally named in a delinquency petition filed in the Milwaukee County Circuit Court, Children's Division, alleging that Jefferson, who was fifteen years old at the time, was a party to two counts first degree sexual assault of a child (one count as a primary actor and a second count alleging that he assisted another). The State filed a petition seeking waiver of the Children's Court jurisdiction.

The court conducted a series of hearings on the petition. Ultimately, on May 8, 2007, the Children's Court waived jurisdiction. Jefferson appealed the waiver order and the Court of Appeals affirmed.

Thus, Jefferson was charged in the present case.

The complaint alleges in great detail events that took place on September 4, 2006 in Milwaukee. Generally the complaint alleges that a twelve year-old girl was at the home of a friend. That friend suggested that the girl "suck up one of her boys" and the girl agreed. Also present in the home, at various times, were numerous teenage boys (including Jefferson) and an adult man. The girl eventually wound up in the basement of the home where each of the boys took turns performing sexual acts with the girl mostly by acts of penis-to-mouth intercourse. At one point the adult male

began having penis-to-vagina intercourse with the girl. The petition alleges that while this was happening Jefferson was standing by assisting the adult. There was no allegation that the girl was ever physically forced or otherwise coerced into participating.

Argument

At the outset it is important to understand that there is no allegation in the complaint that Regine G., who was twelve years old at time, did not consent to the activity alleged. Rather, the activity alleged in the complaint is a serious crime because Regine was only twelve years old and, as a matter of public policy, the legislature has determined that child of that age cannot consent to sexual activity.

Likewise, though, Jefferson was only fifteen years old at the time of the incident. A child of that age, too, has been determined to be unable to consent to sexual activity. [1] Thus, if the allegations of the complaint are taken to be true, Jefferson committed first degree sexual assault of a child by having sexual contact with Regine; and, by the same token, Regine committed the offense of second degree sexual assault of a child by having sexual contact with Jefferson. Second degree sexual assault under sub. (2) is merely a lesser included offense of first degree sexual assault under sub. (1). *State v. Moua*, 215 Wis. 2d 510, 573 N.W.2d 210 (Ct. App. 1997). The Wisconsin Supreme Court has recognized that the consent of the minor victim, between the ages of twelve and fifteen, is neither an element of sexual assault nor a defense. *State v. Kummer*, 100 Wis. 2d 220, 229-30, 301 N.W.2d 240, 245 (1981),

As between the two children involved, only Jefferson stands charged with a felony in this case. It is pretzel logic of the first order to reason that although Jefferson is too immature to consent to sexual activity for himself but, on the other hand, if Terrell

1 Sec. 948.02(2), Stats., provides: "(2) **Second degree sexual assault**. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.

does decide to have sexual contact with another person who is also too immature to consent that he has now committed a crime that is nearly as serious as any crime on the books.

I. Sec. 948.02, Stats. is unconstitutional because its proscriptions may be applied against the very persons that the statute is intended to protect and also violates Jefferson's equal protection rights because the prosecutor made the charging decision based on gender.

The constitutionality of a state statute presents a question of law. *State v. Migliorino*, 150 Wis. 2d 513, 524, 442 N.W.2d 36, 41, cert. denied, 493 U.S. 1004 (1989). The court must presume that a statute is constitutional. *Schramek v. Bohren,* 145 Wis. 2d 695, 702, 429 N.W.2d 501, 503 (Ct. App. 1988). "There are two major categories of constitutional challenges: 'facial' challenges and 'as-applied' challenges." *State v. Jeremy P.*, 2005 WI App 13, P5, 278 Wis. 2d 366, 692 N.W.2d 311. Jefferson makes an as-applied-to challenge to Sec. 948.02, Stats. A party challenging the constitutionality of a statute as applied must demonstrate it is unconstitutional beyond a reasonable doubt. *State v. Joseph E.G. (In the Interest of Joseph E.G.)*, 2001 WI App 29, P5, 240 Wis. 2d 481, 623 N.W.2d 137.[2]

A. The purpose of the statute is to protect children from sexual conduct with *adults.*

The launching point of this discussion, whether we are addressing the statute's overbreadth issue or its equal protection issue, is to determine the *purpose* of Sec. 948.02, Stats. The Court of Appeals has recognized that the purpose of Sec. 948.02, Stats., is to *protect children* from being preyed upon sexually by *adults*. The statute was never intended to allow the prosecutor to determine, as between two children, whose "fault" it was that childish sexual experimentation occurred- and to then bring down the awesome power of the government upon the head of the child determined by

2 Jefferson's constitutional challenge must be an "as applied to" challenge because the statute does not, on its face, create suspect classifications. Rather, because Jefferson, as a minor, was himself unable to consent to sexual activity, the statute is unconstitutionally broad and violative of equal protection.

the prosecutor to be at fault.. The court of appeals has written, concerning the constitutionality of Sec. 948.02, Stats., that, "The State's interest in protecting children and prohibiting sexual activity *between them and adults* is of greater import than the burden upon an adult to determine whether a prospective sexual partner is unable to consent to sexual activity." (emphasis provided) *State v. Spagnola*, 199 Wis. 2d 123 (Wis. Ct. App. 1995). Sec. 948.02, Stats. provides *no* circumstances under which it is legal for a child under the age of sixteen to engage in sexual activity- not even marriage is a defense. Moreover, the penalties for a violation of Sec. 948.02, Stats. are as serious as the criminal law in Wisconsin allows.

Thus, the clear purpose of the statute is to protect children from sexual advances by adults.

B. The statute is overbroad because Jefferson, as a child, is a person that the statute is intended to protect.

As mentioned above, the legislature has evidenced a strong public policy in favor of protecting children from their own poor decisions concerning sexual activity with adults. Nonetheless, Sec. 948.02, Stats., does not *exclude* children from its proscription. Thus, there exists the irrational possibility where, as here, two children decide to engage in sexual activity and one of the children is "protected" by the statute and the other is reviled, charged with a felony, and faces decades in prison. The statute is, therefore, unconstitutionally over-broad.

> A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called "chilling effect."

State v. Neumann, 179 Wis. 2d 687, 711, 508 N.W.2d 54, 63 (Ct. App. 1993) (quoting *Bachowski v. Salamone*, 139 Wis. 2d 397, 411, 407 N.W.2d 533, 539 (1987) (citation omitted).

Here, the legislature has determined that children have a right to be protected from their own poor judgment when it comes to sexual behavior. A child under the age of sixteen years simply *cannot* consent to sexual contact or sexual intercourse- even if he or she is *married* to the person with whom the sexual contact occurs. *See,* Sec. 948.02(4) , Stats. Moreover, if the child is under the age thirteen and the sexual contact results in great bodily injury the penalty is *life in prison.* This evidences an extremely strong public policy in favor of protecting children from their own poor decisions concerning their sexuality.

It is absurd, then, that Sec. 948.02, Stats., does not *exclude* from its proscription the situation where it is another child, as opposed to an adult, with whom the sexual contact occurs. Under these circumstances, there exists the possibility, as in this case, where one of the children is "protected" by the statute and the other child faces decades of imprisonment and is reviled by the community- even though both children willingly engaged in the sexual activity. Whether a child is placed into the category of victim or culprit appears to depend entirely upon the caprice of the prosecutor.

Under these circumstances, imagine the "chilling effect" where parents discover that their child has engaged in sexual activity with another child. Does one call the police and simply *hope* that one's child is not labeled by the prosecutor as the offender and sent to prison for decades? What guidance does the statute provide for the exercise of prosecutorial discretion? Here, the line seems to have been drawn based on gender.

For these reasons, Sec. 948.02, Stats., is unconstitutionally over-broad because it sweeps into its purview the very people that the statute is intended to protect (i.e. children who might consent to sexual activity). Where two children engage is consensual sexual activity there does not seem to be any rational basis for treating the children differently.

C. The statute violates Jefferson's equal protection rights because there is no rational basis to treat Jefferson differently than Regine.

"The equal protection clause of the fourteenth amendment is designed to assure that those who are similarly situated will be treated similarly." *Treiber v. Knoll*, 135 Wis. 2d 58, 68, 398 N.W.2d 756, 760 (1987). Where the State is not discriminating based upon a suspect classification, the classification need only bear a rational relationship to a legitimate government interest. *McManus*, 152 Wis. 2d at 130-31, 447 N.W.2d at 660-61. Simply because a statutory classification results in some inequity does not provide a basis for holding it to be unconstitutional. *Id.* at 130-31, 447 N.W.2d at 660. The legislative enactment must be upheld unless it is "patently arbitrary." *Id*. (citing *Frontiero v. Richardson*, 411 U.S. 677, 683, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973)).

When considering an equal protection challenge that does not involve a suspect or quasi-suspect classification, "the fundamental determination to be made … is whether there is an arbitrary discrimination in the statute …, and thus whether there is a rational basis which justifies a difference in rights afforded." *Ruesch*, 214 Wis. 2d at 564, 571 N.W.2d at 905 (quoting State v. Akins, 198 Wis. 2d 495, 503, 544 N.W.2d 392, 395 (1996)). A statute violates equal protection if it creates an irrational or arbitrary classification. *Id*. However, a statute that creates a classification that is rationally related to a valid legislative objective does not violate equal protection guarantees. *Id*.

Here, an argument may be made that the reason Regine G. was treated as a victim and Jefferson was treated as a defendant is gender based. Gender-based distinctions must serve important governmental objectives and must be substantially related to achievement of these objectives in order to withstand judicial scrutiny under the equal protection clause. *Caban v. Mohammed,* 441 U.S. 380, 388 (1979) If the statute itself provided for a gender-based distinction there would be no doubt that the statute created a suspect class. The statute, however, does not expressly draw a gender distinction. That was done by the prosecutor.

By not excluding children from the statute's proscription, the statute creates two classes of persons: (1) Those children whom the prosecutor deems to be worthy of protection (i.e. the "victim"); and, (2) Those children whom the prosecutor deems to deserve the statute's severe penalty (i.e. the "defendant").

The statute provides no guidance to the exercise of the prosecutor's discretion. By definition, then, the classification is irrational and arbitrary. It depends upon the mood and the perception of the individual prosecutor.

The situation here is very similar to the situation where there exist two statutes with identical elements but with drastically different penalty provisions. Such statutes have been attacked on equal protection grounds because the statutes provide the prosecutor with excessive prosecutorial discretion. The appellate courts have held that the mere presence excessive prosecutorial discretion, alone, does not invalidate a statute; however, where the prosecutor exercises the discretion in a manner that that treats classes of people differently the courts will step in. In, *State v. Cissell*, 127 Wis. 2d 205, 216 (Wis. 1985) the court explained:

> The Supreme Court analyzed the problem of overlapping statutes with different penalties as an issue of prosecutorial discretion. The Court stated [***15] that: "This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." Id. at 123-24. Under this approach, the fact that the defendant's conduct may be chargeable under either of two statutes does not make prosecution under one or the other statute improper per se; the focus instead is on whether the prosecutor unjustifiably discriminated against any class of defendants.

Here, there is no denying the fact that the prosecutor's charging decision was based on gender. Regine G., a girl, willingly engaged in sexual contact with a number of boys including Jefferson. As between the two, only Jefferson was charged.

The State may argue that Jefferson was charged because he was older (by two years). This may explain why Jefferson was charged with the more serious crime of first degree sexual assault of a child. It offers no justification, though, for the fact that

Regine, who by the very allegations of this complaint committed the crime of second degree sexual assault of a child, was not charged at all.

Conclusion

For these reasons, it is respectfully requested that the court find that Sec. 948.02, Stats. is unconstitutional as applied to Jefferson.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2008:

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