IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
v.	)	Case No.: 0608004559
	)	0609007835
JOHN GENTRY,	)	
JOHN MUHAMMAD,	)	
	)	
Defendants.	)	

Date Submitted: May 15, 2007

Date Decided: June 8, 2007

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Opinion and Order on Defendants' Motion to Dismiss

On August 14, 2006, Defendant John Gentry (hereinafter "Gentry") was charged with one count of Lewdness under 11 *Del. C.* § 1341. On September 15, 2006, Gentry entered a plea of not guilty and demanded a jury trial. On November 8, 2006, Gentry filed a Motion to Dismiss the charge on the bases that (1) the statute is surplusage under existing Delaware law, (2) the statute is unconstitutionally vague and overbroad and (3), the alleged conduct of Gentry does not amount to lewdness.

A separate motion raising the same issues was filed by Defendant John Muhammad, who was charged with Lewdness under the same statute on September 12, 2006. After briefing by counsel for all parties, and following oral argument on May 15, 2007, the Court reserved decision. This is the Court's decision and order on Defendants' Motion to Dismiss.

Facts

It is alleged that on or about August 4, 2006, John Gentry committed a lewd act by rubbing his crotch and licking his lips while looking at the alleged victim. It is separately alleged that on or about September 12, 2006, John Muhammad committed a lewd act by exposing his genitals to, and beginning to masturbate in the presence of, another alleged victim.

Analysis

In their Motion to Dismiss Defendants make three arguments: First, they point out that in enacting 11 *Del. C.* § 1341, the General Assembly failed to define "lewd" or

"lewdness." Defendants essentially argue that because there is no statutory definition for lewdness, lewdness is defined according to Delaware common law, which requires exposure of the naked body or genitals as an element of the offense. Since acts constituting Indecent Exposure are already codified in 11 *Del. C.* §§ 764 and 765, Defendants argue that 11 *Del. C.* § 1341 should be disregarded as surplusage.

In its codification of many common-law criminal offenses, including both Indecent Exposure and Lewdness, the General Assembly neglected to provide a statutory definition of "lewd" or "lewdness." Absent such a definition, statutory terms are generally interpreted according to their commonly accepted meaning and the common law. In this case, however, the Court also has the benefit of legislative history.

In 1965, Governor Charles L. Terry, Jr. appointed a Committee to study the revision of Delaware's criminal law. In 1967 the Governor's Committee for the Revision of the Criminal Law published its Proposed Delaware Criminal Code, which provided that "[t]he Commentary accompanying this Criminal Code may be used as evidence of legislative intent, and as an aid in construing the provisions of this Criminal Code in the event of ambiguity."[1] Since the statutory language describing the Lewdness offense has remained fundamentally unchanged between the time of the Committee's proposal to the time of the offenses,[2] the Committee's commentary on statutory lewdness is an appropriate source of legislative intent.

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[1] Proposed Delaware Criminal Code § 7 (1967).
[2] The offence as proposed in 1967 read as follows: "A person is guilty of lewdness when he does any lewd act in any public place or any lewd act which he knows is likely to be observed by others who would be affronted or alarmed." Proposed Delaware Criminal Code § 820 (1967). The current language describing the offense differs only in that all masculine pronouns have been replaced with the gender-neutral words, "the person": "A person is guilty of lewdness when *the person* does any lewd act in any public place or any

Pertinent to the issues raised in this Motion, the Committee's commentary draws a distinction between lewdness and other sexual or decency offenses:

> This section is intended to prohibit public lewd conduct which does not amount to one of the sexual offenses defined in this Criminal Code. It also prohibits such conduct in private places which is likely to be observed by others who would be affronted or alarmed. Lewdness may in some case be easier to prove than indecent exposure which requires an exposure of the genital organs.[3]

Using this commentary as an aid in interpreting "lewd" or "lewdness," the Court finds that such terms do not necessarily include in their meaning an exposure of the genital organs required for Indecent Exposure. As such, 11 *Del. C.* § 1341 is not surplusage and is not invalidated on that basis.

Defendants' second argument is that 11 *Del. C.* § 1341 is unconstitutionally vague in that it sweeps within its ambit not only evils within the allowable area of government control, but also activities constituting an exercise of protected expressive or associational rights.[4] Because Defendants are bringing a facial challenge to the overbreadth of the statute, this Court must first determine whether 11 *Del. C.* § 1341 reaches a *substantial* amount of constitutionally protected conduct.[5] If it does not, the facial challenge must fail.[6] In both written and oral argument Defendants contend that the lewdness statute as it currently stands would criminalize not just winks, nods,

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lewd act which *the person* knows is likely to be observed by others who would be affronted or alarmed." 11 *Del. C.* § 1341 (emphasis added).

[3] Proposed Delaware Criminal Code, Commentary on § 820 (1967).

[4] *State v. Wien*, 2004 WL 2830892, at *2 (Del. Super.).

[5] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

whistles, or other seemingly innocuous forms of expression, but also innocent movements, gestures, and sounds that are not even intended to be expressive at all.

The Court finds this argument unpersuasive. By its own terms 11 *Del. C.* § 1341 narrows the scope of criminal punishment to those acts which the person (1) *knows* are likely to be observed by others, and (2) *knows* are likely to cause affront or alarm in the observer. Simply put, a person cannot negligently or recklessly commit the offense of lewdness, but must act knowing that his or her conduct is likely to offend or alarm the probable observer. Such informed actions, though admittedly dependant upon the context in which they occur, do not rise to the level of constitutionally protected forms of expression. As such, the Court finds that the lewdness statute does not reach a substantial amount of constitutionally protected conduct and is not void for vagueness.

In his third and final argument Defendant John Gentry argues that even if 11 *Del. C.* § 1341 is upheld, the case against him personally should be dismissed because the act of merely touching or rubbing oneself, near a clothed intimate part of the body, is not lewd. According to the provisions of the statute, this issue cannot be resolved without a factual finding of Gentry's mental state and context in which the acts were performed. The determination of whether Gentry's alleged conduct was performed with knowledge that it was likely to be observed with affront or alarm is a question reserved for the finder of fact. Since there has been no finding of fact at this early stage of the proceedings, it would be inappropriate for the Court to dismiss the charges against Defendant Gentry on this basis.

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[6] *Id.*

CONCLUSION AND ORDER

For the reasons stated herein, Defendants' Motion to Dismiss the charges is hereby DENIED.

IT IS SO ORDERED.

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Jay Paul James, Judge