

STATE OF LOUISIANA

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NO. 2000-KA-0964

VERSUS

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COURT OF APPEAL

DONNIE S. ROPER

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 404-087, SECTION "F"
HONORABLE DENNIS J. WALDRON, JUDGE

JAMES F. MCKAY, III
JUDGE

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones,
Judge James F. McKay, III)

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AFFIRMED

STATEMENT OF THE CASE

On January 11, 1999, appellant Donnie S. Roper was charged by bill of information with crime against nature, specifically the solicitation of another with the intent to engage in oral copulation for compensation, a violation of La. R.S. 14:89A(2). On February 24, 1999, a jury found him guilty as charged. On July 23, 1999, he was adjudged to be a third felony offender and sentenced under the Habitual Offender Law to forty months at hard labor without benefit of probation or suspension of sentence.

STATEMENT OF THE FACTS

On November 19, 1998, Lieutenant Timothy Bayard was wearing plain clothes and driving an unmarked car working undercover in the French Quarter looking for vice activity. As he entered the 1000 block of Dauphine Street, near its intersection with St. Philip Street, there was one car in front of him. Lieutenant Bayard observed the defendant grab his crotch with his right hand and wave with his left hand to the driver of the car immediately in front of him. When the driver of that car moved forward, Lieutenant Bayard's car was abreast of the defendant, who then directed the same motions to him. Lieutenant Bayard drove past the defendant and around the

corner, but notified the other undercover officers in the area by radio that he had a possible investigation. He further advised them of the defendant's description and location.

After circling the block, Lieutenant Bayard observed that one of the other undercover officers, Sergeant Brett Thorne, was in position to observe the pick-up and act as a back up. When Lieutenant Bayard neared the defendant again, he slowed his car, and he and the defendant exchanged greetings. Then, without being asked, the defendant stepped off the curb, walked around the front of Lieutenant Bayard's car, opened the door, and got into the passenger seat.

The defendant first asked Lieutenant Bayard if he was a police officer. Lieutenant Bayard responded negatively. The defendant then reached over and grabbed Lieutenant Bayard in the crotch and began to rub him in the crotch area over his pants. Lieutenant Bayard continued to drive. The defendant proceeded to tell the officer that he was looking to get into trouble. He further said that he would do just about anything but the real rough stuff. Lieutenant Bayard then asked him what he liked to do. The defendant replied that he really liked to "suck dick and that he would give [Lieutenant Bayard] the best blow job [he] ever had." Lieutenant Bayard responded that he was looking for that. The defendant then told the officer

that he was from Florida and asked what the going rate was in the area. Lieutenant Bayard responded that it might be ten, twenty or twenty-five dollars, depending on the individual. The defendant said that he liked the twenty-five dollar rate and would appreciate a tip if it was really good.

At the point that the defendant had established a sexual act and a price, Lieutenant Bayard was at Esplanade and Royal. He proceeded down Esplanade to the floodwall. There he gave a pre-arranged signal to the cover team, which alerted the takedown team. Shortly after that, two uniformed officers, Detectives Danny Jewel and Wilbert Theodore, made a traffic stop. They ordered Lieutenant Bayard out of his car and further ordered him to produce his driver's license, so as not to blow the cover of the officer or the car for future undercover operations. They then proceeded to arrest the defendant.

On cross-examination, the defense attempted to impeach Lieutenant Bayard with a prior inconsistent statement from the motion hearing, in which he denied being flagged down. On re-direct, Lieutenant Bayard reaffirmed his trial testimony and explained that he was unprepared at the motion hearing.

ERRORS PATENT

The appellant assigns as error that the statute under which he was

convicted is unconstitutional. The assignment is discussed below. A review of the record indicates no patent errors.

DISCUSSION

The appellant argues that the statute on which his conviction is based is unconstitutional. The appellant alleges the constitutional challenges raised by the Louisiana Appellate Project in State v. Kelly Baron et al, 99-KA-2094, and State v. Smith et al, 99-0606, 99-2094, 99-2015, 99-2019 (La. 7/6/00), 766 So. 2d 501, and adopts the legal reasoning contained in those challenges as his own.

Specifically, the appellant argues: (1) La. R.S. 14:89 violates the Equal Protection provisions of the Louisiana and United States Constitutions because it overlaps with section 14:82 to punish individuals differently for solicitation of sexual activity for money. The different levels of punishment bear no rational relationship to the legitimate state interest of protecting the public health and welfare. (2) The penalty provision of La. R.S. 14:89, as it applies to solicitation for oral sex, constitutes cruel and excessive punishment because it is grossly disproportionate to the proscribed conduct, and it is out of line with similar solicitation crimes in Louisiana and other jurisdictions. (3) La. R.S. 14:89 is unconstitutionally vague because the term unnatural carnal copulation by itself fails to provide minimal standards

for enforcement and allows for arbitrary and capricious interpretation of proscribed conduct by law enforcement. (4) The Court's reading of oral sexual conduct into section 14:89 would encroach upon the legislature's law making function and intent when the legislature deleted the phrase "with the mouth" from the section.

As noted by the State, since the filing of appellant's brief, the Louisiana Supreme Court addressed these arguments in State v. Mitchell Smith, 99-KA-0606, and consolidated cases, which included the cases relied on by the appellant, and found them to be without merit. The State provided the Smith opinion issued on July 6, 2000. In Smith, the appellant appealed to this Court asserting the same challenges he made in his Motion for Arrest of Judgment. This Court reversed Mr. Smith's conviction finding that La. R.S. 14:89(A)(1), was unconstitutional on its face as an infringement upon the right to privacy expressly guaranteed by Article I, Sec. 5 of the Louisiana Constitution to the extent it criminalized the performance of private, consensual, non-commercial acts of sexual intimacy between individuals legally capable of consent. Furthermore, this Circuit rejected appellant's contentions that La. R.S. 14:89 (A) (2), which prohibits "solicitation by a human being of another with the intent to engage in any unnatural carnal copulation for compensation", as being unconstitutionally vague or

overbroad, which was affirmed by the Louisiana Supreme Court.

Additionally, in considering whether La. R.S. 14:89 violates a constitutional right to privacy guaranteed by the Louisiana Constitution, the Louisiana Supreme Court found that this Court erred by holding that the right of consenting adults to engage in private commercial sexual activity, free from government interference, is protected by the privacy clause of the Louisiana Constitution. Finally, the Smith Court upheld La. R.S. 14:89 (A)(2) and reversed this Circuit by affirming the conviction and sentence of Mitchell Smith. They further vacated all judgments maintaining Motions to Quash in the consolidated cases as violative of State v. Baxley, 94-2982(La. 5/22/95), 656 So.2d 973, which remains the controlling law in the Louisiana jurisprudence. The precedent set by Baxley, was an explicit recognition of the legislature's prerogative to determine "that solicitation for unnatural carnal copulation is more offensive than solicitation for 'indiscriminate sexual intercourse [i.e. prostitution]'" Id. at 98. The Supreme Court's holding in Smith, essentially reaffirmed Baxley as binding precedent in Louisiana.

Accordingly, we affirm the defendant's conviction and sentence.

AFFIRMED