COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2-CR **Cir. Ct. No. 2007CM828**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS S. PRYES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

¶1 NEUBAUER, J.[1] Dennis S. Pryes appeals from a judgment of conviction for having sex with a child age sixteen or older in violation of WIS.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

STAT. § 948.09. Pryes argues that the trial court erred in denying his motion to dismiss on the ground that § 948.09 is unconstitutional because it applies to unmarried persons age sixteen and seventeen, but not to married persons of the same age, thus creating a classification that is irrational and serves no legitimate state purpose. We reject Pryes's argument and affirm the judgment.

BACKGROUND

¶2 On November 8, 2007, Pryes, who was then fifty-one years old, was charged with having "sexual intercourse with a child … who was not his spouse and who had attained the age of 16 years, contrary to [WIS. STAT. §] 948.09, 939.51(3)(a)." Pryes filed a motion to dismiss, arguing that § 948.09 is unconstitutional because it "seeks to criminalize the activities of two consenting adults in violation of the defendant's substantive due process rights. Both the defendant and the alleged victim are adults for constitutional purposes." The trial court denied the motion, and the matter proceeded to trial. Pryes appeals, again challenging the constitutionality of § 948.09.

DISCUSSION

¶3 WISCONSIN STAT. § 948.09, governing "sexual intercourse with a child age 16 or older," provides: "Whoever has sexual intercourse with a child who is not the defendant's spouse and who has attained the age of 16 years is guilty of a Class A misdemeanor."[2] Pryes argues that the statute impermissibly

[2] WISCONSIN STAT. § 948.01(1) defines a "child" as "a person who has not attained the age of 18 years." Although not relevant to the issue on appeal, § 948.01(1) further provides that the definition of "child" does not include those persons who have attained age seventeen if he or she is being prosecuted for allegedly violating a state or federal law.

creates two categories—"*unmarried* persons ages 16 and 17" and "*married* persons ages 16 or 17." Pryes reasons that the criminal statute thus recognizes that persons who are sixteen and seventeen years old have the legal capacity to consent to sexual intercourse, whereas unmarried persons of the same ages do not have that legal capacity. Pryes argues that the classification based on marital status is irrational and serves no legitimate state interest.

¶4 We review challenges to the constitutionality of a statute without deference to the decision of the circuit court. ***State v. Joseph E.G.***, 2001 WI App 29, ¶4, 240 Wis. 2d 481, 623 N.W.2d 137. Statutes generally are presumed to be constitutional, and one challenging a statute on constitutional grounds bears the heavy burden of proving unconstitutionality beyond a reasonable doubt. ***Id.***, ¶5. Moreover, we indulge every presumption favoring constitutionality and, if any doubt exists, it is resolved in favor of upholding the statute. ***State v. McManus***, 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989).

¶5 We understand Pryes to be raising a constitutional challenge based on a right to equal protection under the Fourteenth Amendment to the United States Constitution and article I, section 1 of the Wisconsin Constitution. The Equal Protection Clause prohibits discrimination based on certain invidious classifications, but it does not, in and of itself, create substantive rights. ***Joseph E.G.***, 240 Wis. 2d 481, ¶7. 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." ***Id.***, ¶8. 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, Pryes's claim does not raise an equal protection challenge involving classification based on a suspect criterion such as race or gender; therefore, the statute need only have a rational basis for treating married sixteen and seventeen year olds differently than unmarried sixteen and seventeen year olds. We conclude that it does.

¶6 While Pryes complains that WIS. STAT. § 948.09 classifies married persons differently than unmarried persons, there is a rational basis for that distinction. The purpose of § 948.09 is clear: to protect minors between the age of sixteen and eighteen from the consequences of sexual intercourse. Pursuant to WIS. STAT. § 765.02, a person between the age sixteen and eighteen may marry with parental or custodial permission. Therefore the minor is not without protection or guidance in making his or her decision to marry. While Pryes is correct that once married, the State is no longer able to initiate charges on the minor's behalf under § 948.09, this is precisely the type of balancing we expect from the legislature.

¶7 As cited by the State, we have previously identified the state's interest in protecting children in ***State v. Fisher***, 211 Wis. 2d 665, 565 N.W.2d 565 (Ct. App. 1997). There we addressed a constitutional right-to-privacy challenge to WIS. STAT. § 948.02, governing sexual assault of a child, finding the state had a "significant state interest" in restricting privacy rights when regulating sexual conduct involving minors:

> The state has a strong interest in the ethical and moral development of its children. This state has a long tradition of honoring its obligation to protect its children from others and from themselves…. [A]mong the many significant interests of

> the state are the dangers of pregnancy, venereal disease, damage to reproductive organs, the lack of considered consent, heightened vulnerability to physical and psychological harm, and the lack of mature judgment. Further, the United States Supreme Court has itself observed that "teenage pregnancies … have significant social, medical, and economic consequences for both the mother and her child, and the State." Among the consequences of teenage pregnancies are the attendant psychological, medical and sociological problems associated with a child bearing a child.
>
> The state's significant interest permits the legislature to forbid an adult from having sexual intercourse with a child younger than a legislatively fixed age.

Fisher, 211 Wis. 2d at 674 (citation omitted). Bearing in mind our decision in ***Fisher***, we conclude that there is also a rational basis which justifies the legislature's decision to treat differently unmarried and married sixteen and seventeen year olds. Many of the significant interests of the state are addressed when a minor has obtained permission to marry—most obviously the lack of considered consent, heightened vulnerability to physical and psychological harm, the lack of mature judgment, the potential for sexual exploitation and the potential for a minor bearing a child outside of a marital relationship. WISCONSIN STAT. § 948.09 reflects the legislature's judgment that absent the assurance of parental guidance and considered consent involved in the marriage of a minor, the state is justified in continuing to protect the minor until age eighteen.[3]

[3] Defendant notes that a seventeen year old can be held responsible criminally in adult court under WIS. STAT. § 938.02, and complains that the treatment of a seventeen year old as a child under WIS. STAT. § 948.09 is yet another arbitrary differentiation. We rejected a similar argument in ***State v. Fisher***, 211 Wis. 2d 665, 676, 565 N.W.2d 565 (Ct. App. 1997), wherein we noted that the state's interests in holding children responsible for criminal acts are not contradictory to the state's interests in preventing sexual exploitation of children; the statutes work in concert to fulfill the state's obligation to protect its children from others and from themselves.

¶8 Finally, we reject Pryes's reliance on numerous cases from other states in which the facts differ significantly from those presented here. *See* ***In re J.M.***, 575 S.E.2d 441, 443 (Ga. 2003) (challenging the application of a fornication statute criminalizing sexual intercourse between unmarried persons when both persons have reached the statutory age of consent); ***Martin v. Ziherl***, 607 S.E.2d 367, 371 (Va. 2005) (addressing a fornication statute criminalizing private, consensual sexual intercourse between unmarried adults and specifically noting that the case does not involve minors); and ***Lawrence v. Texas***, 539 U.S. 558, 562 (2003) (challenging a statute criminalizing homosexual conduct between consenting adults). As the State points out, Wisconsin does not have a statute criminalizing sexual intercourse between unmarried persons in private places, nor does this case involve such a general statute applied to sexual intercourse with a minor. Rather, Wisconsin's statute specifically addresses sexual intercourse with a minor.[4] The fact that the legislature provided a statutory exception for two people who are married simply recognizes the existence of WIS. STAT. § 765.02, which permits a person between sixteen and eighteen to marry with the consent of a parent or guardian; it does not serve to lessen the state's interest in protecting minors.

[4] When created by 1987 Wis. Act 332, the legislature noted that WIS. STAT. § 948.09 "[c]ombines the provisions in the current fornication and sexual gratification statutes relating to sexual intercourse with a child where the child is 16 years old or older but younger than 18 years old and is not the defendant's spouse."

CONCLUSION

¶9 For the reasons stated above, we reject Pryes's constitutional challenge to WIS. STAT. § 948.09 and uphold the trial court's order denying his motion to dismiss.[5] We affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[5] Insofar as Pryes may have been raising a constitutional due process argument, we reject his challenge on that ground as well. Due process requires that the means chosen by the legislature to effect a valid legislative objective bear a rational relationship to the purpose sought to be achieved. ***State v. Jackman***, 60 Wis. 2d 700, 705, 211 N.W.2d 480 (1973). For the same reasons we reject Pryes's equal protection challenge, we also reject a due process challenge: the legislature has a valid objective in protecting minors, and WIS. STAT. § 948.09 bears a rational relationship to that purpose.