[Cite as *State v. Baum*, 2020-Ohio-5268.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. William B. Hoffman, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 2020CA00004
CHRISTOPHER BAUM	:	
	:	
Defendant-Appellee	:	OPINION

CHARACTER OF PROCEEDING:	Criminal appeal from the Canton Municipal Court, Case No. 2019CRB3298
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	November 9, 2020

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
JASON REESE Canton City Prosecutor	JACOB WILL 121 South Main Street, Suite 520 Akron , OH 44308
BRITTANY M. FLETCHER Assistant Prosecutor 218 Cleveland Avenue S.W. Canton, OH 44701	

Gwin, J.

{¶1} Appellant the State of Ohio appeals the December 6, 2019 judgment entry of the Canton Municipal Court dismissing the complaint against appellee Christopher Baum.

Facts & Procedural History

{¶2} On July 2, 2019, appellee was charged by complaint with one count of exposing others to contagion, a violation of R.C. 3701.81(A), a misdemeanor of the second degree. The complaint alleges as follows: appellee had sexual intercourse with the victim on multiple occasions with knowledge that he had an incurable sexually transmitted disease (herpes); appellee failed to disclose such information to the victim prior to having sex with her and failed to take reasonable measures to prevent exposing himself to the victim; and, as a result, the victim now suffers from herpes.

{¶3} Appellee filed a motion to dismiss on September 3, 2019. Appellee sought dismissal of the case against him because the term "dangerous" is not defined within R.C. 3701, and because there are no reported cases in Ohio of a criminal prosecution or conviction under R.C. 3701 when the sexually transmitted disease at issue is herpes. Appellee argues the statute is vague as applied to him because there is no statutory definition of "dangerous" and because herpes is not a "dangerous" disease.

{¶4} The trial court held a hearing on the motion to dismiss on October 29, 2019. Counsel for appellant and counsel for appellee each made oral arguments with respect to their positions.

{¶5} The trial court issued a judgment entry on December 6, 2019. In the judgment entry, the trial court states herpes simplex 2 is "primarily transmitted through

direct contact with the virus" and is "generally, but not necessarily, transmitted through sexual contact." The trial court stated it "does not question that each side will be able to proffer expert witnesses on whether herpes simplex 2 is 'dangerous.'"

{¶6} The trial court further found: there was one death related to herpes simplex 2 in 2016; there were three deaths related to the common cold in 2016; there were 182 deaths from shingles in 2016; there were 51,537 deaths from the flu/pneumonia in 2016; and "some internet search results explain that herpes is considered life long, yet manageable, and, not dangerous." The trial court cites articles from Harvard Health Publishing, Healthline, WebMD, and health.com, and concludes "the above review, however, highlights that herpes simplex 2 is less dangerous or at least less terminal than many other illnesses including the common cold and influenza." The trial court noted that the Ohio Revised Code does not contain a definition of "dangerous, contagious" disease and neither party could point to any cases of prosecution under this statute.

{¶7} The trial court found with herpes simplex 2, the "outrage stems from the nature of transmission rather than the dangerousness of the contagion," which "highlights the potential for discrimination or arbitrariness," as the "statute might be enforced based more on contagions that offend rather than contagions that are quantitively more dangerous." The trial court concluded a person of reasonable intelligence could not fairly know ahead of time which contagions are dangerous and which are not and thus, the statute, as applied to appellant, is vague. The trial court dismissed the complaint.

{¶8} Appellant appeals the judgment entry of the Canton Municipal Court and assigns the following as error:

{¶9} "I. THE COURT ERRED IN DISMISSING THE COMPLAINT AGAINST BAUM BECAUSE IT RESOLVED A FACTUAL ISSUE THAT SHOULD HAVE BEEN DETERMINED AT TRIAL.

{¶10} "II. R.C. 3701.81(A) IS NOT UNCONSTITUTIONALLY VAGUE BECAUSE "DANGEROUS" CAN EASILY BE UNDERSTOOD BY A REASONABLE PERSON OF ORDINARY INTELLIGENCE."

I. & II.

{¶11} Appellee was charged with a violation of R.C. 3701.81(A). R.C. 3701.81(A) provides as follows: No person, knowing or having reasonable cause to believe that he is suffering from a dangerous, contagious disease, shall knowingly fail to take reasonable measures to prevent exposing himself to other persons, except when seeking medical aid. R.C. 3701.99(C) states, "whoever violates section 3701.352 or 3701.81 of the Revised Code is guilty of a misdemeanor of the second degree."

{¶12} The trial court dismissed the complaint, finding R.C. 3701.81(A) was unconstitutionally void for vagueness, as applied to appellee. This Court conducts a de novo review of a trial court's decision concerning a defendant's motion to dismiss based upon a constitutional challenge to the statute. *City of Alliance v. Carbone*, 181 Ohio App.3d 500, 909 N.E.2d 688 (5th Dist. 2009); *State v. Cooper*, 5th Dist. Licking No. 2019CA 00102, 2020-Ohio-3748.

{¶13} Statutes enjoy a strong presumption of constitutionality, and a party seeking to have a statute declared unconstitutional must prove its unconstitutionality beyond a reasonable doubt. *In re Brayden James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467; *State v. Anderson*, 57 Ohio St.3d 168, 566 N.E.2d 1224 (1991). "Under the

vagueness doctrine, statutes which do not fairly inform a person of what is prohibited will be found unconstitutional as violative of due process." *State v. Reeder*, 18 Ohio St.3d 25, 479 N.E.2d 280 (1995). However, "impossible standards of specificity are not required * * * the test is whether the language conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices." *Id*, quoting *Jordan v. DeGeorge*, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951).

{¶14} There are two types of challenges to the constitutionality of a statute, a facial challenge or an as-applied challenge. In a facial challenge, "the challenger must show that upon examining a statute, an individual of ordinary intelligence would not understand what he is required to do under the law." *State v. Anderson*, 57 Ohio St.3d 168, 566 N.E.2d 1224 (1971). A challenger asserting a facial challenge must prove, beyond a reasonable doubt, that the statute was so unclear he could not reasonably understand it prohibited the acts in which he engaged. *Id.*

{¶15} However, in this case, appellee does not make a facial challenge to the statute. He admits that diseases such as HIV or AIDS are "obvious" dangerous and contagious diseases that the statute is designed to address. Rather, he makes an as-applied challenge, arguing the statute is vague as applied to him. When a statute is challenged only as applied to the circumstances of the case, the defendant "contends that application of the statute in the particular context in which he has acted, or in which he propose to act, [is] unconstitutional." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512. An as-applied "challenge focuses on the particular application of the statute." *State v. Carrick*, 131 Ohio St.3d 340, 2012-Ohio-608, 965 N.E.2d 264.

{¶16} In its assignments of error, appellant contends the trial court erred in granting appellee's motion to dismiss for several reasons. Appellant first argues the trial court failed to take evidence and appellee submitted no evidence; rather, the trial court improperly relied only upon articles obtained from an internet search, thus making its analysis incomplete. Appellant avers appellee presented no evidence from which the trial court could conclude that a reasonable person would not know whether herpes simple 2 is dangerous because it is not as likely to prove as fatal as HIV or AIDS. Appellant contends simply because appellee could not find any case law in which R.C. 3701.81 was utilized does not automatically mean the statute cannot be constitutionally applied. Appellant finally argues that, if we consider the merits of the case, the statute is not vague and the trial court improperly determined the condition was not dangerous because the term "dangerous condition" is defined in a legal dictionary.

{¶17} We address appellant's first argument, as we find it dispositive of this appeal. At the hearing on the motion to dismiss, counsel for appellee made an oral argument. Counsel for appellee referenced a newspaper article that was not admitted into evidence, and argued the common cold is more dangerous than herpes simplex 2. Appellee presented no evidence as to the dangerousness, or lack thereof, of herpes simplex 2. The only evidence upon which the trial court based its decision was the information obtained from an internet search. There is no authority for a trial court's independent investigation. We find it was error for the trial court to consider evidence outside and record and conduct its own investigation of herpes simplex 2, a medical condition, to determine whether it was dangerous. *J.S. v. L.S.*, 10th Dist. Franklin No. 19AP-400, 2020-Ohio-1135 (holding the trial court erred when it conducted independent

factual research). Since appellee presented no evidence at the hearing about the condition, the trial court's actions affected the disposition of the case. *State v. Bayliff*, 3rd Dist. Auglaize No. 2-10-08, 2010-Ohio-3944; *State ex rel. Allstate Ins. Co. v. Gaul*, 131 Ohio App.3d 419, 722 N.E.2d 616 (8th Dist. 1999).

{¶18} Appellee argues the internet research the trial court did outside the record had no bearing on the trial court's decision and that the trial court did not actually make a determination as to whether the herpes simplex 2 condition was dangerous. Further, that it does not matter if the condition is dangerous or not for purposes of a constitutional analysis. We disagree. As noted above, the trial court clearly relied on its own research outside of the record to support its decision, as the trial court stated the internet research demonstrates the "outrage stems from the nature of transmission rather than the dangerousness of the contagion."

{¶19} Appellee also contends that since he could not find any appellate court cases in which a defendant appealed a conviction pursuant to R.C. 3701.81(A), the statute is unconstitutional as applied to him. Simply because counsel could not find any appellate court cases in which a defendant appealed a conviction under R.C. 3701.81(A) does not automatically equate to unconstitutionality. At least one defendant has appealed a guilty plea of a violation of R.C. 3701.352, a violation whose penalty is also set forth in R.C. 3701.99. *State v. Roepke*, 7th Dist. Mahoning No. 10 MA 138, 2011-Ohio-6369.

{¶20} It is appellee's burden to present clear and convincing evidence of a set of facts that makes the particular application of statute void and unconstitutional as applied to him. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229; *State v. Ross*, 4th Dist. Scioto No. 16CA3771, 2017-Ohio-9400 (affirming the trial court's determination a statute was

vague as-applied, after conducting a hearing on the motion to dismiss in which there was expert testimony). Appellee did not present any evidence, other than argument from counsel, of a set of facts that makes the statute void as applied to him.

{¶21} The trial court found R.C. 3701.81(A) unconstitutional as applied to appellee; however, the only evidence as to how and why it was vague as to appellee came from information the trial court erroneously obtained via the internet, outside the record. The portions of appellant's assignments of error arguing the trial court improperly relied upon evidence outside the record are sustained. The portions of appellant's assignments of error as to the merits of whether the statute is unconstitutionally vague, as applied to appellee, are premature. The trial court has the authority to re-determine the issue, potentially re-opening the hearing for additional evidence. However, the trial court cannot determine the issue using evidence outside the record.

{¶22} Based on the foregoing, the December 6, 2019 judgment entry of the Canton Municipal Court is reversed and remanded for proceedings consistent with this opinion.

By Gwin, J.,

Hoffman, P.J., and

Baldwin, J., concur

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