COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1741-CR **Cir. Ct. No. 2009CF763**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAURIE A. BLUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Laurie Blum appeals from a judgment of conviction for second-degree sexual assault of an inmate as a correctional staff

member, contrary to WIS. STAT. § 940.225(2)(h) (2009-10).[1] Blum raises several claims. First, she argues that § 940.225(2)(h) is unconstitutionally overbroad. Second, she asserts that the trial court erroneously interpreted and applied the statutory language excepting staff members from prosecution where the inmate "is subject to prosecution for the sexual contact or sexual intercourse under this section."[2] ***Id.*** Alternatively, she contends that the trial court's construction of § 940.225(2)(h) renders the statute unconstitutionally vague because it does not allow her to present an affirmative defense to the fact finder. Finally, she argues that the trial court erroneously denied her motion to suppress the custodial statements made to law enforcement officers after her arrest. We disagree with each claim and affirm.

¶2 While employed as a registered nurse at Kettle Moraine Correctional Institution, Blum and an inmate engaged in sexual activity in the prison's health services unit. After learning of the relationship, law enforcement executed a search warrant at Blum's house. Officers discovered incriminating letters and arrested Blum. Blum admitted engaging in consensual sexual activity on the prison unit with the inmate approximately six different times. Blum was charged with one count of second-degree sexual assault of an inmate under WIS. STAT. § 940.225(2)(h).

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

[2] WISCONSIN STAT. § 940.225(2)(h) makes it a crime to have "sexual contact or sexual intercourse with an individual who is confined in a correctional institution if the actor is a correctional staff member." The statute further provides: "This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is *subject to prosecution* for the sexual contact or sexual intercourse under this section." ***Id.*** (emphasis added).

¶3 Blum filed a motion to dismiss, challenging the constitutionality of WIS. STAT. § 940.225(2)(h) on grounds that it was overbroad and violative of her "right of intimate association" under the First and Fourteenth Amendments to the United States Constitution. The trial court determined that the statute was constitutional both on its face and as applied to Blum.

¶4 Blum also filed a motion to suppress custodial statements made to law enforcement officers, arguing that the waiver of her ***Miranda***[3] rights was involuntary and unknowing. The court determined that Blum's waiver and subsequent statements "were the product of an informed, rational, and voluntary decision" and denied the motion.

¶5 Blum also filed a motion seeking to admit evidence of her mental state in order to prove that the inmate was subject to prosecution. The motion included a psychological evaluation of Blum and alleged that at the time of the sexual encounters, Blum was suffering from a mental defect that rendered her incapable of giving consent. Blum's theory was that because her mental defect rendered her incapable of consenting to sexual activity, the inmate was himself subject to prosecution for either third- or fourth-degree sexual assault.[4] The trial court initially ruled that Blum could raise the question of whether the inmate was subject to prosecution as an affirmative defense at trial.

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[4] Blum relied on WIS. STAT. § 940.225(3) and (3m), both of which criminalize nonconsensual sexual activity. She argued that she was incapable of giving consent due to "a mental illness or defect which impair[ed] [her] capacity to appraise personal conduct." *See* WIS. STAT. § 940.225(4).

¶6 Later, Blum sought to expand the scope of her affirmative defense. Blum requested that the court instruct the jury that the inmate was subject to prosecution if he aided and abetted Blum in the commission of the crime charged (sexual assault by a correctional staff member), or if he solicited or conspired with Blum to commit that crime. The court rejected this theory and also reconsidered its original decision to allow evidence of Blum's nonconsent.

¶7 The court ultimately ruled that it would not allow Blum to present any affirmative defense to the jury. The court expressed frustration over the statute's lack of clarity but explained, "The legislature did not make it overt that this was intended as an affirmative defense." The court determined that the question of whether an individual is subject to prosecution was intended to be a question of law for the judge to decide prior to trial. After considering the evidence of record, the trial court found there was no probable cause to believe the inmate was subject to prosecution. Based on the court's rulings, the parties agreed to a stipulated bench trial, and Blum was convicted of second-degree sexual assault.

Constitutionality of the Statute

¶8 Statutes infringing on a fundamental liberty interest or First Amendment protection are subject to strict scrutiny and must be narrowly tailored to serve a compelling government interest. ***State v. Smith***, 2010 WI 16, ¶12, 323 Wis. 2d 377, 780 N.W.2d 90; ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶52, 333 Wis. 2d 273, 797 N.W.2d 854. Where fundamental rights are not implicated, statutes must bear a rational relation to a legitimate state interest. ***Tammy W-G.***, 333 Wis. 2d 273, ¶53. The constitutionality of a statute presents a question of law which is subject to independent review. ***Id.***, ¶16. The parties dispute which party

bears the burden to prove whether the statute is constitutional or unconstitutional. They also disagree about the appropriate level of scrutiny to apply. We will not decide these issues because the statute survives even strict scrutiny, no matter which party bears the burden of proof.[5]

¶9 Blum argues that the statute is overbroad because it unnecessarily criminalizes all sexual activity between inmates and correctional staff, regardless of whether the staff member has actual authority over the inmate. She argues that the purpose of the statute is to prevent abuses of authority and that it is not narrowly tailored to accomplish this goal. She asserts that, at the very least, the statute is unconstitutional as applied to her circumstance because there is no indication she had special authority over this inmate. Blum believes we should apply strict scrutiny to the statute because it implicates the First Amendment and also infringes on a fundamental liberty interest.

¶10 Even if strict scrutiny did apply, we believe WIS. STAT. § 940.225(2)(h) is narrowly tailored to serve compelling government interests. The statute not only prevents abuses of power, it also serves a number of other compelling state interests. As concisely stated by the warden at Blum's sentencing, inappropriate relationships between staff and inmates create a security threat to the institution because historically, these staff members can be enticed to introduce contraband into the institution. They may do so either out of affection for the inmate or because the inmate has threatened to disclose the relationship, putting the employee's employment at risk. Either scenario poses a threat to the

[5] Because the statute survives strict scrutiny, it also satisfies the less stringent rational-basis test.

institutional safety of the staff and inmates. Additionally, sexual activity between staff and inmates adversely affects the reputation and integrity of the institution and its staff. As the warden explained:

> Correctional institutions have historically struggled with perceptions that staff is comprised primarily of uneducated, easily corrupted individuals, undeserving of public respect or trust. The profession has worked very hard over the many years to change those misperceptions…
>
> Ms. Blum's action has given cause for the public to once again view correctional staff as they may have in the past. This tarnished reputation has a negative impact, both in the community and within the correctional workforce as a whole, by fuelling distrust and demoralizing staff.… [I]t demonstrates to inmates that those type of staff members do exist. This encourages inmates to actively seek to identify staff members who might be willing to engage in such behavior. Throughout the nation, there have been instances where staff members have engaged in illicit relationships with inmates. At times, these have resulted in tragic consequences….

In light of these compelling interests, the statute is narrowly drawn.

¶11 We also reject Blum's as applied challenge. Regardless of whether she actually exercised any coercive power over the inmate, she was certainly in a position to do so. Additionally, because the statute serves to maintain institutional security, preserve its integrity, and elevate public trust, it is Blum's status as a staff member that matters, not merely her ability to exercise authority.

¶12 Given the numerous interests protected by the statute, we conclude that it is constitutional beyond a reasonable doubt, both on its face and as applied to Blum. The Supreme Court has held that "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." ***Preiser v. Rodriguez***, 411 U.S. 475, 491-92 (1973). The statute

certainly bears a rational relation to legitimate state interests. It is also narrowly tailored to achieve its compelling goals.

Determining whether an inmate is subject to prosecution for the sexual activity

¶13 Blum argues that the "subject to prosecution" language in WIS. STAT. § 940.225(2)(h) provides an affirmative defense to her crime and should be determined by the fact finder at trial. She argues that the defense was properly at issue in her case on two alternate theories: (1) that her mental state rendered her incapable of consent such that the inmate was subject to prosecution for third- or fourth-degree sexual assault and (2) that by engaging in sexual activity with Blum, the inmate was subject to prosecution for either aiding or soliciting Blum's illegal conduct, or by conspiring with Blum to commit the crime.

¶14 We agree with the trial court that whether an inmate is subject to prosecution is a question of law for the court. Because the determination involves an assessment of whether conduct likely constitutes commission of a crime, its resolution is akin to a finding of probable cause. Such determinations are made by courts, not juries. *See* ***State v. Payette***, 2008 WI App 106, ¶14, 313 Wis. 2d 39, 756 N.W.2d 423 (whether a criminal complaint alleges sufficient facts to establish probable cause is a question of law); WIS. STAT. § 970.03(1) ("A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant."). To compel the fact finder to determine whether an inmate is subject to prosecution is a recipe for juror confusion and onerous mini-trials.

¶15 We acknowledge that the statute, itself, does not provide guidance on what to consider when determining whether an inmate is subject to prosecution.

The State suggests two possible methods: (1) requiring the commencement of a formal prosecution through the filing of a complaint or (2) a probable cause determination by the trial court. It is also possible the legislature intended to leave to the trial court which of these methods to employ in a particular case. We need not decide which is appropriate because under any of these, the exception does not apply. No criminal complaint was filed against the inmate in this case. Further, the trial court correctly determined there was no probable cause to believe the inmate was subject to prosecution for the sexual contact or sexual intercourse at issue. With regard to Blum's argument that the inmate, himself, committed a sexual assault, Blum described herself to police as the initiator of the sexual activity and wrote explicit letters to the inmate of her own volition. Nothing in Blum's psychological evaluation supports her argument that she was statutorily incapable of giving consent. If it is Blum's position that her personality disorder and depression significantly impacted her capacity to appraise or control her behavior, she had the option to plead not guilty by reason of mental disease or defect. *See* WIS. STAT. § 971.15(1).

¶16 We also reject Blum's theory that the inmate was subject to prosecution because he aided, solicited, or conspired with Blum to commit the proscribed sexual activity. We agree with the State that this construction of the "subject to prosecution" language would produce absurd and unreasonable results. ***Lake City Corp. v. City of Mequon***, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997) (it is a fundamental rule of statutory construction that we must avoid interpreting statutes in a manner that produces absurd results). To apply the exception to a correctional staff member who willingly engages in sexual conduct with an inmate defeats the central purpose of the statute, to prevent abuses of authority by those in power, and to maintain the security of the institution,

including the safety of the staff and inmates. This interpretation also contradicts the legislature's express determination that an inmate's consent is "not an issue." WIS. STAT. § 940.225(4).

¶17 We further reject Blum's argument that construing WIS. STAT. § 940.225(2)(h) without an allowance for affirmative defenses renders the statute unconstitutionally vague as applied to her case. A statute is void for vagueness if it does not provide fair notice of the prohibited conduct and an objective standard for enforcement. ***State v. Smith***, 215 Wis. 2d 84, 91, 572 N.W.2d 496 (Ct. App. 1997). Section 940.225(2)(h) provides clear notice to correctional employees which behavior is prohibited: sexual contact or intercourse with inmates. The statute also provides an objective standard for enforcement. *See* ***Smith***, 215 Wis. 2d at 92. The parties suggest that the statute is ambiguous because it does not set forth the precise procedure for determining whether an inmate is subject to prosecution. Though the statute may be unclear as to the correct procedure, it does not follow that "a trier of fact must apply its own standards of culpability rather than those set out in the statute." ***Id.*** A statute is not unconstitutionally vague simply because it is ambiguous. ***Id.***

¶18 We conclude that the trial court correctly determined that the inmate was not subject to prosecution as a matter of law. Therefore, the court properly refused to allow Blum to argue or present evidence related to an affirmative defense.

Suppression of Blum's statements

¶19 Blum argues that the trial court should have suppressed her custodial statements because she did not knowingly and intelligently waive her rights under ***Miranda***. She concedes that the State made a prima facie showing that her

Miranda waiver was valid, but asserts that her level of intoxication and reluctance to answer questions constituted sufficient countervailing evidence to rebut the prima facie case. We disagree.

¶20 The State carries the burden under ***Miranda*** to demonstrate by a preponderance of the evidence that the defendant was advised of and understood her constitutional rights and that she intelligently waived those rights. ***State v. Beaver***, 181 Wis. 2d 959, 966-67, 512 N.W.2d 254 (Ct. App. 1994). The State establishes a prima facie case of proper waiver where the defendant has been advised of her ***Miranda*** rights and indicates she understands them and is willing to give a statement. ***Beaver***, 181 Wis. 2d at 967. If the State establishes a prima facie case, then, in the absence of countervailing evidence, the statement should be admitted. ***Id.*** The fact of a subject's intoxication does not automatically render her ***Miranda*** waiver involuntary. ***Beaver***, 181 Wis. 2d at 967.

¶21 After an evidentiary hearing, the trial court denied Blum's suppression motion in a written decision:

> The court notes that the defendant felt that she was under the influence of intoxicants on the night in question. However, from the court's perspective, the defendant did not manifest any difficulty in conversing with law enforcement officers; her responses to Detective Norlander's inquiries were rational, thoughtful, and responsive. Moreover, the defendant did not exhibit any difficulty with her gait or balance on the evening of the search of her residence and subsequent arrest…

¶22 Based on these findings, the court ruled that Blum "failed to demonstrate sufficient countervailing evidence to rebut the State's prima facie showing." We agree that these facts do not sufficiently rebut the State's prima facie case.

¶23 Moreover, Blum has not provided any link between her self-reported intoxication and her decision to make a custodial statement. The only evidence presented to the court was her taped interview and the testimony of the officers. Blum did not testify or introduce evidence of her blood-alcohol content at the hearing. In the absence of affirmative evidence of her level of intoxication and its impact on her decision to make a statement, the trial court properly ruled that Blum's ***Miranda*** waiver was valid.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.