FILED
FEB 23 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	Filed February 23, 1983
Plaintiff-Appellee,	)	2-421/68054
vs.	)	
HOPE MARTIN "BUZZ" ANDERSON,	)	
Defendant-Appellant.	)	

Appeal from Black Hawk District Court, Joseph C. Keefe, Judge.

The defendant appeals from his conviction and sentence for the crime of sexual abuse in the third degree in violation of Iowa Code section 709.4(3). AFFIRMED.

Lawrence F. Scalise and Ann Fitzgibbons of the Scalise Firm, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for the plaintiff-appellee.

Heard en banc.

OXBERGER, C.J.

The defendant, Hope Martin "Buzz" Anderson, appeals from his conviction and sentence for the crime of sexual abuse in the third degree in violation of Iowa Code section 709.4(3). On appeal, he argues (1) that section 709.4 lacks a rational relationship to a legitimate state interest and is therefore violative of his constitutional rights to due process and equal protection under the laws; (2) that the operation of Iowa Code section 907.3, as applied to this defendant, is unconstitutional; and (3) that if this court affirms the defendant's conviction, it should remand the case for resentencing and direct the trial court to designate a minimum security facility in which the defendant might serve his prison term. We affirm.

On January 7, 1981, Anderson entered a plea of guilty to the crime of Sexual Abuse in the Third Degree in violation of Iowa Code section 709.4. He then filed a motion in arrest of judgment on the grounds that Chapter 709.4 of the Code violated the constitutions of the State of Iowa and the United States, and on the ground that he was deprived of his rights to due process and equal protection and subjected to cruel and unusual punishment as a result of the operation of Iowa Code section 907.3. This motion was overruled and Anderson was sentenced under sections 709.4 and 709.9 to a prison term not to exceed ten years.

This case results from sexual relations that took place between Anderson and Lisa Christianson in November, 1980. There seems to be no doubt that Lisa initiated the contact, that she deceived Anderson into believing that she was sixteen years of age, and that prior to and following their liaison, she had been living a rather sordid life. At the time of this liason, Lisa was only thirteen years old, although there is no dispute that she appeared to be much older. Lisa testified that she had frequently run away from home, beginning when she was

barely twelve years old. She stayed with people she met at parties or hitchhiking, drank, smoked marijuana, used LSD and amphetamines, and frequently slept with men. She had lived with older men, and both before and after her liaison with Anderson, she supported herself by prostitution. Her travels took her from Iowa to New York City and as far west as California. She used false ID's in taverns.

It is clear from her testimony and that of a friend that she deliberately set out to make contact with Anderson, with the intention of having sexual relations with him. Lisa testified that her relations with Anderson were voluntary on her part and that they were both willing parties.

I. The Constitutionality of Iowa Code section 709.4

Iowa Code section 709.4, under which Anderson was convicted, provides that "[a]ny sex act" between persons who are not living together as husband and wife is sexual abuse in the third degree when:

> 1. Such act is done by force or against the will of the other participant.
> 2. The other participant is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters.
> 3. The other participant is a child.
> 4. The other participant is fourteen or fifteen years of age and the person is a member of the same household as the other participant. . . . .
> 5. The person is six or more years older than the other participant, and that other participant is fourteen or fifteen years of age.

In State v. Sullivan, 298 N.W.2d 267 (Iowa 1980), the supreme court declared that a portion of section 709.4(2) was unconstitutionally vague.

Anderson argues that section 709.4 lumps together a number of offenses that are quite different from one another. Subsection (1) requires a general criminal intent to use force, subsection (4) requires a specific intent to use authority to coerce, and subsections (3) and (5) apparently require no intent at all.

In support of his contention that no intent is required in order to establish that the defendant has violated section 709.4(3), Anderson cites Iowa Uniform Jury Instruction No. 912:

> Lack of knowledge on the part of the person as to the actual age of the child would not be a defense to the crime charged. Likewise, it would be immaterial whether the person, at the time of such sex act, if any, may have believed the child was fourteen years of age or older.

Anderson goes on to argue that the supreme court, in State v. Conner, 292 N.W.2d 682 (Iowa 1980), construed sections 707.1-.5 as showing a "gradation of culpability commensurate with the gradation of punishment." Id. at 684. Thus, first degree murder, requiring malice aforethought, deliberateness, and premeditation or aggravating circumstances, was followed by second-degree murder, requiring only malice aforethought, and these were followed by voluntary manslaughter and involuntary manslaughter. The penalties for each of these ranged downward from life in prison to two years imprisonment and a fine of $5,000. The court then explained:

> To read subsection 707.5(1) literally, as requiring no mens rea or fault, but subsection 707.5(2) as requiring recklessness would be to impose a stricter sanction for a crime requiring less culpability, in contradiction of the statutory scheme.

The court went on to cite State v. Dunn, 202 Iowa 1188, 1189, 211 N.W.850, 851 (Iowa 1927): "Whether a criminal intent or guilty knowledge is an essential element of a statutory offense, is to be determined as a matter of construction from the language of the act, in connection with its manifest purpose and design." Conner at 685.

The court then turned to the common law definition of the crime for clarification of the nature of the element of criminal intent which was missing from the statute, since the revision of the Iowa criminal law is considered "primarily a restatement of prior law" by Professor John H. Yeager, who prepared the initial drafts of new statutes for the legislative subcommittees on substantive criminal law and sentencing. Id.

Finally, the court noted that although the General Assembly had discarded the malum in se/malum prohibitum distinction, which had been criticized as being vague, the purposes inherent in that distinction nevertheless remain in the criminal code. However, this was not determinative in the court's decision. In Conner, the court found that an interpretation of subsection 707.5(1) that would exclude any particular mental state requirement would be unreasonable, for such an interpretation would necessarily include violations of traffic regulations which impose strict liability as a basis for involuntary manslaughter, thus subjecting a person to a possible sentence of five years of imprisonment when he was not conscious "of the grave risks of his acts." Such a result would lead to the stigmatization and punishment of persons who are "morally blameless." Id. at 686.

It is worthy of note that the court in Conner did not find that the provision in question was unconstitutional. It merely construed the provision in light of its common law heritage as requiring recklessness. It is also worth noting that four justices, in a special concurrence, wrote: "While I think it would be unwise and unjust, I do not question the authority of the General Assembly to define involuntary manslaughter without a mental element. As noted in division IV of the dissent, the wisdom and justice of a statute are for the legislature." Id. at 689. The dissent, by two justices, made the same point.

There is ample additional authority for the proposition that it is not for us to decide upon the wisdom of legislation, since that task has been delegated by the constitution to the General Assembly. See, e.g. Hawkins v. Preisser, 264 N.W.2d 726, 729 (Iowa 1978)("We do not pass upon the wisdom of the statute"); City of Waterloo v. Selden, 251 N.W.2d 506, 508 (Iowa 1977)("The legislature may pass any kind of legislation it sees fit so long as it does not infringe the state or federal constitutions. Courts do not pass on the policy, wisdom, advisability or justice of a statute."); Lunday v. Vogelmann, 213 N.W.2d 904, 907 (Iowa 1973)("our view of the wisdom of the legislation is irrelevant.").

Anderson argues that persons who violate sections 709.4(1) and (4) are more culpable than those who violate section 709.4(3) because the former involve the use of force against persons who have not consented or the exploitation of children who are entrusted to the violator's care, while in the latter there is no force, no violation of trust, no likelihood of physical injury, and relatively little likelihood of mental injury. In addition, persons violating section 709.4(3) may be entirely unaware of the fact that they are committing a crime, since they might be deceived as to age or mental defect or incapacity of the other person. He argues that one might be morally blameless and unintentionally violate section 709.4(3), and that when criminal intent is lacking, as he says it was in this case, the defendant is morally blameless and ought not to be punished.

Citing State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978), the supreme court in State v. Tague, 310 N.W.2d 209, 211 (1981), reiterated the State's interest in regulating the sexual activity of younger citizens. "The State has at least as much interest in protecting its children as in protecting retarded or mentally deficient adults." The court there declined to rule that section 709.4(3) required knowledge or intent, and responding to an argument similar to Anderson's, based upon Conner, the court held that this statute is not unconstitutional. "Statutes regarding sex offenses are common examples of employment of strict liability intended to protect the public welfare. As such they do not violate due process." Tague at 211.

The court in Tague, where the facts were similar to those in the instant case, held that the defendant was not morally blameless. In State v. Cobb, 311 N.W.2d 64, 68 (Iowa 1981), the court reiterated its position that the State has a vital interest in the sex activities of its young citizens," and declared that "[t]his same state interest is evident in section 709.1(3)." The court in Cobb noted that

age had traditionally been a factor in defining sex crimes, and that the present sexual abuse chapter was simply a new application of these old principles. The court added:

> Thus in defining sexual abuse, the legislature, not only in section 709.4(4), but throughout the chapter, regarded sexual abuse crimes in certain non-violent settings to be as culpable as those in which there is violence or threat of violence. We cannot say this is an irrational classification.

Id.

Finally, in State v. Sullivan, 298 N.W.2d 267, 271 (Iowa 1980), the supreme court, referring to section 709.4(3), said that it was designed to protect "children, who of course are deemed to lack the mental maturity to give consent."

In Coil, the court considered the argument that the predecessor to section 709.4(4), i.e. section 698.4 (1975), was unconstitutional because it violated the defendant's constitutional right of privacy. In that case, the defendant had been convicted of asaulting a thirteen-year-old girl with intent to commit rape, and he contended that the State had not demonstrated a "compelling and necessary" interest in regulating sexual relations between consenting persons. The court noted, however, that there was a distinction between sexual relations performed in private between consenting adults of the opposite sex and what it called the "adult corruption of children." The court held, therefore, that the State's significant interest in regulating the sexual activity of its young people permitted the State to "fix the age at which minor females may consent to sexual intercourse," and upheld the constitutionality of the statute.

In view of these considerations and the many precedents that have rejected similar arguments, we find that the defendant has not met the substantial burden of demonstrating that the statute under which he was convicted is unconstitutional. On the contrary, we find that it is within the prerogative of the

legislature to define the age of consent for children, that below that age, no minor can legally consent to sexual relations, and that however unwise we may feel a particular statute might be, especially as applied to a specific and very unusual case, that is not sufficient to justify our determining that that statute is violative of the constitution. As the supreme court said in Sullivan:

> The potential offender who would engage in sex acts with a stranger may be required to ask questions to be "safe," just as he or she would be required to do in order to ascertain the other's chronological age to avoid prosecution under subsection 709.4(3).
>
> The fact an erroneous judgment by an offender may still subject him or her to criminal sanction if the partner in fact does not possess the requisite mental capacity does not make the statute unconstitutional. This crime does not require knowledge or intent. As in the case of sexual abuse due to age status, the policies in support of protecting those who suffer mental incapacity outweigh the danger of mistake. [citation]

Sullivan at 273.

Anderson also contends that classification of section 709.4(3) as a forcible felony violates his right to equal protection. This, as we indicated above, is based upon his contention that persons who violate section 709.4(3) are less culpable, less blameworthy, than those who violate other subsections of section 709.4.

The supreme court has already disposed of this issue in State v. Cobb, 311 N.W.2d 64 (Iowa 1981). In a lengthy argument which need not be recounted here, the court concluded that "any sexual abuse" is a forcible felony, that the present sexual abuse chapter is simply a new application of old principles in which the State has always had a vital interest, that the legislature regarded sexual abuse crimes in certain nonviolent settings to be as culpable as those in which there was violence or the threat of violence, that that was not an irrational classification, and that the statute was therefore not unconstitutional.

II. Constitutionality of the Penalty

Under Iowa Code section 901.5, the trial court is given the discretion to defer judgment, to suspend execution of the sentence, to defer sentence, or to

pronounce judgment and sentence the defendant to confinement and then reconsider the sentence. However, the options available to the trial court under section 901.5 are not applicable to a person convicted of a forcible felony after a guilty plea. Iowa Code § 907.3 (1981). On the ground that application of section 907.3 to violators of section 709.4(3) is arbitrary and unnecessary, Anderson argues that the punishment is violative of the cruel and unusual punishment clauses of article I, section 17 of the Iowa Constitution and the eighth amendment of the United States Constitution. He argues that the standard of punishment should be commensurate with culpability, as suggested in Conner, supra, and that equating violations which involve force and violence with those which do not is irrational. Punishing persons who commit crimes not involving force and violence in the same manner and to the same degree as those who commit forcible and violent crimes is excessive as regards the former, he says. On a variety of utilitarian grounds, he argues that the failure to distinguish between those violations that are accompanied by force and violence and those that are not is irrational.

In Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), the United States Supreme Court held "that for crimes concededly classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislative prerogative." 445 U.S. at 1139, 63 L. Ed. 2d 391. In Rummel, the Court upheld a sentence of life imprisonment for a defendant who was sentenced under a habitual offender statute after being convicted of obtaining $120.75 by false pretenses, having previously been convicted of passing a forged check for $28.36 and fraudulent use of a credit card to obtain $80 worth of goods and services. See also Hutto v. Davis, _____U.S._____, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982).

It is for the legislature to determine whether utilitarian considerations such as those advanced by Anderson justify greater or lesser penalties. Unless it can be demonstrated that a given penalty violates the constitutional rights of our citizens, we will not attempt to second-guess the General Assembly.

III. Designation of the Penal Facility

Anderson asks this court to designate a minimum security facility in which he might serve his prison term. Upon imposing a sentence of confinement for more than one year, a trial court is required to "commit the defendant to the custody of the director of the division of adult corrections." Iowa Code § 901.7 (1981). It is then up to the director of the division of adult corrections to determine the appropriate place of confinement for that individual. Iowa Code section 902.5 (1981).

The statutes under which Mr. Anderson was convicted and sentenced are not unconstitutional, and the trial court did not abuse its discretion in committing him to the custody of the director of the division of adult corrections.

We therefore affirm.

AFFIRMED.