

DEC 21 1978

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed December 21, 1978
vs.	)	
DEBRA LEE HENDERSON,	)	686
Appellant.	)	<u>61426</u>

Appeal from Black Hawk District Court - Carroll E. Engelkes, Judge.

Defendant appeals conviction of solicitation for prostitution in violation of Section 724.2, The Code 1977. - Affirmed.

Michael M. Pedersen, of Gallagher, Martin, Keith & Langlas, Waterloo, for Appellant.

Richard C. Turner, Attorney General of Iowa, J. Susan Carney, Assistant Attorney General, and David H. Correll, Black Hawk County Attorney, for Appellee.

Heard by Oxberger, C. J., and Snell, Carter and Johnson, JJ. Donielson, J., takes no part.

PER CURIAM

Defendant Debra Henderson appeals conviction of solicitation in violation of § 724.2, The Code 1977. She alleges trial court erred in overruling her demurrer to the information and refusing to give proposed jury instructions, and she attacks the constitutionality of § 724.2, The Code 1977. We affirm.

The information filed against defendant charged that she "did willfully and unlawfully solicit certain individuals, they being males, for a consideration to have carnal knowledge of her, ... in violation of § 724.2." Defendant's demurrer challenged the constitutionality of the statute. Trial court overruled the demurrer and in doing so distinguished the instant offense from the holding in *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976), because of the element of commercialization. Defendant argues that trial court impermissibly relied on an element that was not available to the court for consideration. We recognize that matters which are not before the court may not furnish grounds for sustaining (or overruling) a demurrer. *State v. Aldrich*, 231 N.W.2d 890, 893 (Iowa 1975). In the instant case, however, the information on its face referred to the element of commercialization because it charged defendant with solicitation for a consideration. We find, therefore, that trial court did not rely on extraneous matters in overruling the demurrer.

Next, defendant contends that § 724.2 is unconstitutional because it is vague, an invasion of privacy, an improper delegation of legislative authority, and a violation of her right to free speech. The vagueness and privacy issues were recently discussed in *State v. Henderson*, 269 N.W.2d 404 (Iowa 1978). There, the court held that defendant had no standing to assert vagueness because she was convicted under the "for a consideration" language of § 724.2, The Code 1977. *Id.* at 405. Her privacy argument failed because "the zone of privacy created by the United States Supreme Court does not extend to the activities of prostitutes in plying their trade." *Id.* at 406. We find the above pronouncements from Henderson are controlling in the instant case.

In connection with the improper delegation argument, defendant complains that the broad language of the statute fails to provide standards to govern the exercise of prosecutorial discretion. Defendant ignores the narrow interpretation

given the statute by the court. Section 724.2 has been construed to prohibit only solicitation for prostitution. See State v. Willis, 218 N.W.2d 921, 923 (Iowa 1974). Thus, unfettered discretion has not been lodged in the police and prosecuting authorities as defendant has alleged.

Defendant's final constitutional attack on the statute is based on the free speech guarantee of the first amendment. She argues that a conviction for violation of § 724.2 amounts to punishment for the utterance of mere words which is constitutionally forbidden. We find this contention without merit in view of the holding in State v. Price, 237 N.W.2d 813 (Iowa 1976), that prostitution itself is criminally punishable. The broad social purposes of the first amendment do not extend that amendment's protection to verbal acts soliciting criminal conduct. Cherry v. State, 18 Md. App. 252, 306 A.2d 634, 637-41 (1973).

Defendant also alleges trial court erred by refusing to submit two of her requested instructions to the jury. One of these instructions told the jury that if the police aided, encouraged, or solicited the commission of the offense, defendant must be acquitted. Defendant argues that the evidence presented a jury question on whether or not she had been solicited by the police officer. We note, however, that trial court did instruct the jury that in order to convict defendant there must be proof beyond a reasonable doubt that she ^hsolicited the officer to have intercourse with her for a consideration. No error occurred in trial court's refusal to submit defendant's proposed instruction #3 since the point it raised was substantially covered in another instruction. State v. Stanton, 214 N.W.2d 125, 126 (Iowa 1974). The other proposed instruction stated in effect that if defendant abandoned her attempt to commit the crime she must be found not guilty. It is true that defendant did not engage in sexual intercourse with the officer on the evening in question. She was charged, however, with the crime of solicitation for prostitution. Abandonment of the act of prostitution is not equivalent to abandonment of the initial solicitation. Trial court properly refused to submit proposed instruction #2. See State v. Haines, 259 N.W.2d 806, 811 (Iowa 1977).

AFFIRMED.