-GAY'S WORD AGAINST COP'S-

Warning

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Asked in One-Witness Prosecutions

NewsWest has invited a number of attorneys particularly knowledgeable in the field of gay and human rights to write a regular signed column dealing with legal issues. Most have declined on the basis that such a column could be construed as a violation of the Bar Association's ban on advertising. A number have, however, consented to present their views from time to time on specific legal issues. One of these is Los Angeles gay attorney Thomas F. Coleman. —Ed.

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Criminal cases involving charges of lewd conduct or oral copulation usually involve only two witnesses, a male vice squad officer and a gay male defendant. Their testimony usually conflicts, the vice officer stating that he saw the defendant masturbating (or being copulated) and the defendant testifying that he did not commit such an act. The outcome of the case depends upon whom the jury believes—the vice officer or the defendant.

The typical lewd conduct case arises when a vice officer arrests a gay man for engaging in masturbation in a restroom, park or movie house. The average oral copulation case consists of a vice officer who claims to have observed two men in an act of oral copulation, usually with no other witness to the act.

If the gay defendant pleads not guilty, he is entitled to a jury trial. At the trial, the prosecutor must produce evidence to convince a jury that the defendant committed the alleged sexual act. In most of these cases the only evidence produced is the testimony of one vice officer. There are no other witnesses and there are no photographs of the incident. The jury is asked to convict the defendant based upon the testimony of the vice officer alone, without any additional proof.

Up to the present time, at the close of the trial, the judge has instructed the jury that "A charge such as that made against the defendant in this case is one which is easily made and, once made, is difficult to defend against even if the person accused is innocent. The law requires that you [the jury] examine with caution the testimony of the complaining witness." This statement has been called the "cautionary instruction."

Legislation has been introduced which would prohibit the giving of this cautionary instruction. Assembly Bill 194, authored by Assemblyman McAlister, would forbid the instruction being given in rape cases. Senate Bill 574, authored by Senator Robbins, would prohibit such instructions in oral copulation and sodomy as well as rape cases. S.B. 574 has already passed the State Senate and is pending in the Assembly Criminal Justice Committee.

Recently the California Supreme Court, in a unanimous decision, has held that the mandatory use of the cautionary instruction in sex cases has outworn its usefulness and is no longer to be given (*People v. Rincon-Pineda*, Crim. 18510). Since the giving of the cautionary instruction was required pursuant to court decisions (and not mandated by legislation), the court had the power to stop its use. This case seems to do what S.B. 574 and A.B. 194 would have done in this respect.

The cautionary instruction has been a great tool for defense attorneys in the trial of sexual cases. It is so easy for a vice officer to point the finger and yet so difficult for a gay defendant to establish his innocence. So often, lewd conduct or oral copulation cases are based upon discriminatory enforcement of the law against gays, or upon entrapment by officers. If the cautionary instruction is no longer used, it will be easier for vice officers to convict gay men.

Assemblyman Ken Meade has introduced legislation (A.B. 1595) which would require that a cautionary instruction be given in *all* criminal cases (not just sexual cases) in which the prosecution's case is based upon the testimony of one witness only. His bill has passed the State Assembly and is now pending in the Senate Judiciary Committee. This legislation makes sense and would be of great benefit to gay persons arrested on sex charges.

The Los Angeles Police Department has come out against A.B. 1595, as could be expected. Pursuant to the urging of the LAPD, the Los Angeles City Council recently passed a resolution opposing this bill. The city will now spend taxpayers' money to lobby against it.

In my opinion, the passage of A.B. 1595 would be of great benefit to the gay community, especially to persons who find themselves the target of police entrapment. Without the cautionary instruction it will be more difficult for defense attorneys to win these cases. A.B. 1595 should be supported by the community.