L. A. No. 30901

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PRYOR, Petitioner,

v.

THE MUNICIPAL COURT FOR THE LOS ANGELES JUDICIAL DISTRICT OF LOS ANGELES COUNTY, Respondent;

PEOPLE, Real Party in Interest.

Application for modification of opinion is denied.

Bird

Chief Justice

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DON BARRY PRYOR, Petitioner, vs. MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Real Party In Interest.	L.A. No. 30901 PETITION FOR MODIFICATION OF OPINION

TO THE HONORABLE ROSE ELIZABETH BIRD, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Real Party in Interest, the People of the State of California, having read and considered the opinion filed in the above entitled case on September 7, 1979, requests that this Court modify that opinion in three respects. First, the statement of

the Court's ruling appearing on pages 2 and 26 of the slip opinion should be clarified regarding the necessity of the presence of a person who may be offended by a public lewd act. Second, this requirement that persons who may be offended be present should be made separate from the definition of the term "lewd". Finally, the printer's error appearing in footnote 11 on page 22 of the slip opinion should be corrected.

I

THE OPINION SHOULD BE MODIFIED TO REQUIRE ONLY A REASONABLE LIKELIHOOD THAT A PERSON WHO MAY BE OFFENDED WILL BE PRESENT

The statements of the Court's ruling appearing on pages 2 and 26 of the slip opinion suggest that in order for a violation of Penal Code section 647(a) to occur, someone who may be offended must actually be present. As stated on page 26 of the slip opinion, such a violation can occur only

> "if the actor knows or should know of the presence of persons who may be offended by his conduct."
> (Emphasis added.)

This language conflicts with the opinion's approval of the quoted portion of In re Steinke (1969) 2 Cal.App.3d 569, 576 appearing on page 25 of the slip opinion:

> "the gist of the offense proscribed in [Penal Code section 647] subdivision (a) ... is the presence or possibility of someone to be offended by the conduct." (Emphasis added.)

The apparent conflict over whether a violation of section 647(a) can occur only if the accused should have known that an onlooker was actually present, or whether it is sufficient that the accused should have known it was likely the conduct would be observed will to create substantial problems. One important example will occur in prosecutions for solicitation of a public lewd act. It is clear that such a solicitation is not prohibited under section 647(a) unless the act solicited is prohibited by the section. If the actual presence of an onlooker were required for an act to violate section 647(a), it would follow that an element of the crime of solicitation must be that the solicited act would actually take place in the presence of an onlooker. As a practical matter, however, this would be impossible to prove if the solicitation were for an act to occur in a public place some distance from the location where the solicitation is made. Further, it would be anomalous for the legality of a solicitation for a lewd act to occur in a public place frequently used by the public (such as a park, beach, or sidewalk) to be contingent upon the fortuitous circumstance of whether the People can prove that someone actually would have been present when the act occurred.

The rule of In re Steinke, supra, 2 Cal.App.3d 569, 576, avoids these problems while providing for more consistent enforcement of the section and better protecting the public's interest in preventing open sexual conduct which may offend unwilling viewers. This approach would prohibit the solicitation of lewd acts which are to occur in a public place where it is likely there will be persons present who may be offended. This will avoid the prospect of a police officer who either receives or overhears such a solicitation from rushing off to the proposed site of the sexual conduct to see if anyone would be present to establish probable cause for arrest.

In addition to the problem in solicitation cases, a difficult situation occurs in cases in which the only two persons present during the commission of a lewd act are the defendant and a plainclothes police officer. Frequently, the only effective method of both detecting repeat violators of section 647(a) and deterring future violations is by the use of undercover officers who provide the opportunity for the commission of such an offense. If, for example, the officer does not object to a sexual touching, the defendant might well be reasonable in believing the officer would not be offended. The defendant could then assert that a reasonable belief that no one was present who might be offended when the act occurred, even though it was quite likely that an onlooker might have arrived at any moment, provides a complete defense to the charge, thus, the legality of the act would be conditioned on whether a third person happened to pass by. In fact, an act which was apparently

legal at its inception due to the absence of such a third person might become illegal when an onlooker arrived.

These problems could be avoided without altering the essence of the opinion by inserting the word "likely" into the statement of the Court's ruling appearing on pages 2 and 26 of the slip opinion, to wit:

> "by a person who knows or should know of the likely presence of persons who may be offended by the conduct."

In addition, the same considerations support a similar modification of the statement appearing on page 25 of the slip opinion to read,

> "the state has little interest in prohibiting that conduct if it is unlikely that anyone will be present who may be offended.[12/]"

II

THE DEFINITION OF THE TERM "LEWD" SHOULD NOT BE TIED TO THE REQUIREMENT THAT SOMEONE WHO MAY BE OFFENDED BE PRESENT

Although the opinion clearly states that the definition of the terms "lewd" and "dissolute" set forth apply only to section

647(a), the phrasing of that definition on page 26 of the slip opinion may cause substantial confusion. The last clause of that definition seemingly limits the term "lewd" to refer only to acts performed when "the actor knows or should know of the presence of persons who may be offended by his conduct." It can be expected that an attempt will be made to apply this definition to other statutes employing the term "lewd", such as Penal Code sections 647(b) (prostitution) and 11225 (Red Light Abatement).

This potential source of confusion can easily be limited without altering this Court's ruling. This could be accomplished by moving the clause "if the actor knows or should know of the presence of persons who may be offended by his conduct" from the sentence defining the term "lewd" and including it in the next sentence. Incorporating both this change and the change suggested in section I above, the Court's ruling on page 26 of the slip opinion would read as follows:

> "For the foregoing reasons, we arrive at the following construction of section 647, subdivision (a): The terms "lewd" and "dissolute" in this section are synonymous, and refer to conduct which involves the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense. The statute prohibits such conduct only <u>if the</u>

actor knows or should know of the likely presence of persons who may be offended by his conduct and it occurs in any public place or in any place open to the public or exposed to public view...."

The above phrasing would clarify the fact that the requirement of the possibility of an offended onlooker applies solely to section 647(a) and is not necessarily intended to be part of the definition of the word "lewd" as that term is used in any other statute.

III

THE WORD "VIOLENT" SHOULD BE INSERTED IN PLACE OF THE WORD "PUBLIC" IN THE QUOTE IN FOOTNOTE 11

A printer's error appears in footnote 11 on page 22 of the slip opinion. In the quoted portion of Penal Code section 415, subdivision (3), the phrase should read "an immediate violent reaction" rather than "an immediate public reaction."

DATED: September 24, 1979

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DON BARRY PRYOR, Petitioner, vs. MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, Respondent, PEOPLE OF THE STATE OF CALIFORNIA Real Party In Interest	L.A. No. 30901 RESPONSE TO PETITION FOR MODIFICATION OF OPINION

TO THE HONORABLE ROSE ELIZABETH BIRD, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, Don Barry Pryor, through his attorney, Thomas F. Coleman, having read and considered both the Opinion of this Court filed September 7, 1979, and Real Party In Interest's Petition for Modification of that Opinion, responds as follows:

(1) Opposes Real Party's suggested modification of the Court's ruling appearing on pages 2 and 26 of the Opinion to require only a "reasonable likelihood" of the presence of a person who may be offended.

(2) Opposes Real Party's proposal that the definition of "lewd" be made separate from the requirement of the presence of a person who may be offended.

(3) Agrees that the printer's error appearing in footnote 11 on page 22 of the slip opinion should be corrected.

I

THE PRINTER'S ERROR SHOULD BE CORRECTED

Petitioner has no objection to the correcting of the printer's error at page 22 in footnote 11 as specified by Real Party.

II

REAL PARTY'S SUGGESTED MODIFICATION WOULD CREATE SUBSTANTIAL FIRST AMENDMENT PROBLEMS WHERE NONE NOW EXIST

Real Party has asked this Court to modify its Opinion because, under that Opinion, Real Party contends that prosecutions for solicitation will be difficult, evidence gathering will be more time consuming, and prosecutors and police may have problems getting convictions.

Actually, some prosecutions will not be difficult at all, especially in those situations in which the solicitor asks that a sexual act be performed "here and now". The arresting

officer can easily testify to a jury concerning the circumstances, surroundings, and persons present in such an immediate time and place. If the sexual act would be criminal under such circumstances and if the prosecution can prove the defendant intended for the sexual act to be performed under those circumstances, a conviction would follow.

The types of prosecutions made difficult or precluded under the Opinion are justifiably thus limited. Real Party seems to have overlooked the longstanding principle "(T)hat the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Bradenburg v. Ohio (1969) 89 S.Ct. 1827.

The present Opinion is consistent with this principle. The prosecution must prove defendant had the specific intent that the crime be committed. This is the gist of the solicitation portion of the statute. When a person engages in conversation with another regarding the possibility of the two engaging in sexual conduct at some future time and at some distant place, who is to say whether the solicitor intended that a crime be committed. After actually reaching the proposed destination the solicitor may evaluate the situation and decide to abort the proposed sexual activity because of the presence of others who might be offended.

As the Opinion now reads, it protects the interest of the state in prohibiting the solicitation of imminent lawless action by means likely to produce such action. At the same time

the First Amendment rights of those who have conversations regarding possible sexual conduct are protected. This balancing of interests should not now be upset by Real Party's suggested modification because police or prosecutors wish to have people convicted without the necessity of conducting investigations as to whether or not the circumstances surrounding the commission of the sexual act would lower it to a crime. Expediency and administrative convenience have never been sufficient to shift that balance where First Amendment rights are involved.

In conclusion on this point, if the defendant wants the sexual act to occur in a public place at or near where the conversation occurs and at or near in time to the conversation, very little is required by way of investigation to determine if the commission of the sex act would be a crime. If, however, the defendant suggests a sexual act to occur at some time and place remote from the time and place of the conversation, who is to say whether the defendant intends for a crime to be committed. He may honestly feel that no one will overlook the activity at that location and he may have a reasonable expectation that the proposed location will be private and out of public view. With such a state of mind, under this opinion as well as under the holding of Brandenburg, above, such a defendant should not be convicted.

III

OTHER "PROBLEMS" RAISED BY REAL PARTY ARE SOLVED BY A PROPER READING OF THE PRESENT OPINION

A. The language of Steinke cited by this Court in its Opinion is not inconsistent with the holding in the Opinion.

At page 25 of the slip Opinion this Court quoted from In re Steinke, supra, (1969) 2 C.A.3d 569, 576; "the gist of the offense proscribed in [Penal Code Section 647] subdivision (a) . . . is the presence or possibility of someone to be offended by the conduct." Real Party is interpreting this language a certain way, i.e. the possible presence of someone to be offended. Petitioner interprets this language to mean the presence of someone who will be offended or the presence of someone who possibly will be offended. Either reading of this language would seem reasonable. Because both interpretations are reasonable and one supports the Opinion of this Court while the other apparently conflicts with it, the reading which supports the Opinion should be adopted.

B. Assuming, arguendo, the inconsistency of the Steinke language with the holding of this Court, a proper reading of the full Opinion resolves the conflict.

In footnote 13 on page 26 of the slip Opinion, this Court stated "language in the following decisions inconsistent with the present opinion is disapproved: . . . In re Steinke, supra, 2 Cal.App.3d 569;" thus, any apparent conflict which

Real Party visualizes is resolved by this footnote; there is no conflict since the footnote disapproves of any conflicting language. Therefore, the only remaining interpretation of the Steinke language is the interpretation set forth by Petitioner in the paragraph above which supports the holding of the Court, i.e. "the presence of someone who will be offended or the presence of someone who possibly will be offended."

C. The problems cited by Real Party at page 4 of the Petition for Modification, are spurious.

At page 4 of the Petition for Modification Real Party sets forth a hypothetical prosecution for a sexual touching of a plainclothes officer. When one person touches the crotch area of another person and only those two persons are present (without any onlookers) the person who is touched should not complain if he expressly or impliedly consented to the touching. In essence, this is a battery. When such touchings are prosecuted as violations of Section 242 P.C. (battery) the test for innocence is whether the defendant had a reasonable belief that the person he touched would not object to the touching. See People v. Sanchez (1978) 8 C.A.3d Supp. 1. The Opinion of this Court in the instant case merely brings the lewd conduct law into conformity with the law of battery when there are no onlookers who might be offended. If there are onlookers and if the defendant should know that they are likely to be offended, then a conviction for lewd conduct might occur, even if the person whose crotch is touched does not object.

Real Party discusses this hypothetical situation as if it creates a problem -- Petitioner fails to see what that problem might be.

At page 5 of the Petition for Modification, Real Party raises other false problems. Basically Real Party argues that the Opinion should be modified because of its potential effect on other sexual statutes. However, Real Party does not demonstrate how other statutes will be adversely affected. Real Party proposes that this Court separate its holding that someone must be present who may be offended from its definition of "lewd." At least for purposes of Section 647(a) and its definition of "lewd", this separation would not conform to this Court's Opinion as expressed at the bottom of page 24 and top of page 25 of the slip opinion, namely that, as to "lewd conduct," "A constitutionally specific definition must be limited to conduct of a type likely to offend." Likelihood of offense is the essence of the crime and provides the state interest. The separation which Real Party proposes is not merely a grammatical change; it would now seem to countermand the constitutional requirement of a limited definition. The Opinion should, therefore, remain unchanged in this respect.

The ultimate shaping and honing of the ramifications of Pryor on other statutes are properly the responsibility of appellate courts in prosecutions for violations of those statutes. It is not the responsibility of this Court in the case at bar to render an advisory opinion as to how other sexual statutes may be affected. While such a discussion might make for an interesting law review article, possible ramifications, if any exist, are not properly

before this Court in the context of an actual case or controversy.

IV

THE OPINION IS INTERNALLY CONSISTENT

The Opinion of this Court is internally consistent, precise, and clear, well thought out, and consonant with constitutional principles. Thus, modification is inappropriate.

DATED: October 2, 1979

Respectfully submitted,

THOMAS F. COLEMAN