Filed 3/1/04 In re Martin M. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re MARTIN M., A Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN M.,

Defendant and Appellant.
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H025631

(Santa Clara County
Superior Court
No. J121122)

Appellant Martin M. admitted allegations in a Welfare and Institutions Code section 602 petition that he had committed the offenses of oral copulation with a minor (Pen. Code, § 288a, subd. (b)(1) and misdemeanor unlawful sexual intercourse with a minor (Pen. Code, § 261.5, subd. (b)). The court declared the oral copulation offense to be a felony and set Martin's maximum time of confinement at three years and two months. Martin was returned home on probation to serve a 90-day juvenile hall commitment under the electronic monitoring program (EMP). On appeal, Martin claims that treating the oral copulation offense as a felony violates his right to equal protection because there is no adequate justification for treating oral copulation more harshly than sexual

intercourse. We agree and order the juvenile court to declare the oral copulation offense to be a misdemeanor and to recalculate Martin's maximum time of confinement.

I. Background

In June 2000, at the age of 15, Martin was declared a ward and returned home on probation after he admitted a misdemeanor allegation in a Welfare and Institutions Code section 602 petition that he had exhibited a deadly weapon (a baseball bat) in a threatening manner (Pen. Code, § 417, subd. (a)(1)). He served a 60-day juvenile hall commitment at home under EMP. Martin successfully completed his probation, and the case was dismissed in March 2002.

In November 2002, a new Welfare and Institutions Code section 602 petition was filed alleging that, in October 2002, 17-year-old Martin had committed forcible rape in concert (Pen. Code, § 264.1), forcible rape (Pen. Code, § 261, subd. (a)(2)) and forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)). When questioned by the police, Martin readily admitted having had sexual intercourse with the 14-year-old victim and also admitted that the victim had orally copulated him. Martin insisted that these activities were consensual.

In December 2002, the petition was amended to add allegations that Martin had committed misdemeanor unlawful sexual intercourse with a minor (Pen. Code, § 261.5, subd. (b)) and felony oral copulation with a minor (Pen. Code, § 288a, subd. (b)(1)). Martin admitted these two allegations, and the original allegations were dismissed at the prosecutor's request.[1] The court declared the oral copulation offense to be a felony. Martin's trial counsel objected to this

[1] There is no indication in the record that Martin's admissions were entered pursuant to a plea agreement of any kind. Martin told the court that he was not admitting the allegations because of any "promises" that had been made to him.

declaration. "I don't think there's a rational basis for the minor to be charged with a felony oral copulation with a minor when the maximum that he can be punished for actually having intercourse is a misdemeanor . . . ." The court overruled his objection: "The Legislature in their wisdom has determined that there are certain acts that are more serious than the other."

At the January 2003 dispositional hearing, the juvenile court accepted the probation department's recommendation that Martin be declared a ward and returned home on probation to serve a 90-day juvenile hall commitment at home on EMP. Martin's maximum time of confinement was set at three years and two months.

Martin's trial counsel filed a motion asking the court to reduce the oral copulation offense to a misdemeanor because treating it as a felony violated Martin's right to equal protection. In opposition, the prosecutor asserted that oral copulation was "a more degrading act for the victim." After a February 2003 hearing on the motion, the court denied the motion. "I think that the state is within its right to limit certain behavior, to classify it as either a felony or misdemeanor, and to differentiate between various kinds of sex without the necessity of justifying it based upon what is more serious." Nevertheless, the court set the matter for another hearing in June 2003 to consider a reduction of the oral copulation offense to a misdemeanor under Penal Code section 17, subdivision (b)(5).[2] "And I fully expect, given what I have read in terms of his short period of time that he's been on probation, that if he keeps proceeding in that direction, I think it's a sure thing. [¶] I also invite you to appeal the court's decision in the

[2] To our knowledge, the juvenile court has not reduced the oral copulation offense to a misdemeanor.

hopes of having a . . . case that's more on point." Martin filed a timely notice of appeal.

II. Analysis

A violation of Penal Code section 288a, subdivision (b)(1) is alternatively punishable as either a felony or a misdemeanor. "[A]ny person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year." However, a violation of Penal Code section 261.5, subdivision (b) is punishable only as a misdemeanor.[3] "Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor."[4]

Martin asserts that the distinction that these statutes draw between the punishment for unlawful sexual intercourse and the punishment for unlawful oral copulation lacks adequate justification and therefore violates his right to equal protection.

"The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. It is often stated that [t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an

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[3] Unlawful sexual intercourse in violation of Penal Code section 261.5 where the perpetrator is more than three years older than the victim is alternatively punishable as either a felony or a misdemeanor. (Pen. Code, § 261.5, subds. (c), (d).)

[4] Martin was two years, six months and eight days older than the victim.

unequal manner. The use of the term 'similarly situated' in this context refers only to the fact that [t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. There is always some difference between the two groups which a law treats in an unequal manner since an equal protection claim necessarily asserts that the law in some way distinguishes between the two groups. Thus, an equal protection claim cannot be resolved by simply observing that the members of group A have distinguishing characteristic X while the members of group B lack this characteristic. The 'similarly situated' prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714, citations and quotation marks omitted.)

Here, the members of both groups engaged in consensual sex acts with minors and are no more than three years older or three years younger than their victims. The sole distinction between the members of the two groups is the nature of the sex act: members of one group engaged in sexual intercourse while members of the other group engaged in oral copulation. The primary legislative intent underlying these proscriptions is to protect minors from the exploitation to which they are "uniquely susceptible."[5] (*People v. Scott* (1994) 9 Cal.4th 331,

[5] The proscription on unlawful sexual intercourse with a minor is also intended to help prevent minors from becoming pregnant. However, the designation of unlawful sexual intercourse as a *misdemeanor* where the perpetrator and the victim are within three years of each other's age, as opposed to a potential felony when the perpetrator is more than three years older than the victim, does not reflect any reduction in the risk of pregnancy but solely a reduction in the risk that exploitation is involved. Sexual intercourse between a 15-year-old and a 17-year-old poses at least the same risk of pregnancy as sexual intercourse between a 15-

341-342.) Both sexual intercourse with a minor and oral copulation with a minor involve the potential for sexual exploitation of a minor. While the acts themselves are distinct, those who engage in these acts are sufficiently similar with respect to the primary purpose of these proscriptions to justify further scrutiny of the punitive distinction between them.

The Attorney General argues that there is not sufficient similarity to merit further scrutiny because the proscription on unlawful sexual intercourse with a minor is a narrow proscription that applies only to male perpetrators and female victims while the proscription on oral copulation with a minor is a broad proscription that extends to perpetrators and victims of either gender. Not so. The proscription on unlawful sexual intercourse is gender neutral. While, under California law, "sexual intercourse" is an act of penile-vaginal intercourse that may only occur between a male and a female (see *People v. Holt* (1997) 15 Cal.4th 619, 675-676), Penal Code section 261.5's proscription does not identify the gender of the perpetrator or the victim. Thus, either a male or a female may violate the proscription against unlawful sexual intercourse with a minor by engaging in sexual intercourse with a minor of the opposite gender.

The only way in which the oral copulation with a minor proscription is more broad is that it may apply to an act between two males or between two females. Because Martin and his victim were not of the same gender, we have no occasion here to consider whether punishing consensual homosexual sex acts more harshly than consensual heterosexual sex acts violates the U.S. Constitution. We need only consider the constitutionality of punishing consensual oral copulation between a male and a female whose ages differ by no more than three years more

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year-old and a 22-year-old, but the risk that the 15-year-old is being exploited is increased where a much older individual is the perpetrator.

harshly than consensual sexual intercourse between a male and a female whose ages differ by no more than three years.

"The next step in analyzing an equal protection challenge is a determination of the appropriate standard of review." (*Nguyen* at p. 715.) A classification that subjects members of one group to misdemeanor punishment while subjecting similarly situated members of another group to felony punishment "affects a fundamental interest" and therefore must be subjected to strict scrutiny. (*Nguyen* at p. 717.) Here, those who perpetrate unlawful sexual intercourse with a minor and are within three years of the minor's age are subjected to misdemeanor punishment while those who perpetrate unlawful oral copulation with a minor and are within three years of the minor's age are potentially subject to felony punishment. Consequently, the classification affects a "fundamental interest" and must be subjected to strict scrutiny.

"[O]nce it is determined that the classification scheme affects a fundamental interest or right the burden shifts; thereafter the state must first establish that it has a compelling interest which justifies the law and then demonstrate that the distinctions drawn by the law are necessary to further that purpose." (*Nguyen* at p. 716, citation and quotation marks omitted.) Here, the state has failed to establish that it has a compelling interest that justifies the precise distinction drawn here. (See *People v. Jones* (2002) 101 Cal.App.4th 220, 233-237 (Mihara, J. dissenting).)

The Attorney General maintains that the distinction may be justified by the Legislature's presumed conclusion that oral copulation is a more prevalent problem. He reasons that "minors are more willing to engage in alternatives to sexual intercourse such as oral copulation, which cannot result in pregnancy." This proposed justification is far from compelling. Both proscriptions are intended to protect minors from exploitation. Unlawful sexual intercourse with a

minor, unlike oral copulation with a minor, actually creates greater risks because a pregnancy may result. This increased risk to minors could only justify harsher punishment for sexual intercourse with a minor not harsher punishment for oral copulation with a minor.

We can only conclude that the state has failed to establish that a compelling justification necessitates treating Martin's offense of oral copulation with a minor female within three years of his age more harshly than it would be treated if the sex act were sexual intercourse. The proper remedy here is to direct the juvenile court to declare Martin's oral copulation with a minor offense to be a misdemeanor and to recalculate his maximum time of confinement.

III. Disposition

The juvenile court's order is reversed. The matter is remanded to the juvenile court with directions to declare the oral copulation with a minor offense to be a misdemeanor and to recalculate the maximum time of confinement accordingly.

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Mihara, J.

WE CONCUR:

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Elia, Acting P.J.

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Wunderlich, J.