

NO. A05-1782

State of Minnesota
In Supreme Court

State of Minnesota,

Respondent-Plaintiff

v.

John Joseph Bussmann,

Appellant-Defendant.

REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities ii

Legal Issues on Appeal iv

Argument

 I. Minnesota Statue § 609.344, subd. 1(1)(ii) Is Unconstitutional 1

Conclusion 14

TABLE OF AUTHORITIES

Cases

| | |
|--|----------|
| <u>Apprendi v. New Jersey</u> , 530 U.S. 466 (2000) | 8 |
| <u>Bowen v. Kendrick</u> , 487 U.S. 589 (1988) | 5, 6, 13 |
| <u>Continental Can Co. v. State</u> , 297 N.W.2d 241 (Minn. 1980) | 9 |
| <u>Doe v. F.P.</u> , 667 N.W.2d 493 (Minn.Ct.App. 2003) <u>rev. denied</u> | 7, 8 |
| <u>In re Estate of Jotham</u> , 722 N.W.2d 447 (Minn. 2006) | 10 |
| <u>Jones v. Wolf</u> , 443 U.S. 595 (1979) | 5, 9 |
| <u>Kolender v. Lawson</u> , 461 U.S. 352 (1983) | 12 |
| <u>Metropolitan Sports Facilities Comm. v. County of Hennepin</u> , 561 N.W.2d 513 (Minn. 1997) | 3 |
| <u>Norris Grain Co. v. Nordaas</u> , 232 Minn. 91, 46 N.W.2d 94 (1950) | 2 |
| <u>Odenthal v. Minn. Conference of Seventh-Day Adventists</u> , 649 N.W.2d 426 (Minn. 2002) | 5, 9 |
| <u>Sabri v. United States</u> , 541 U.S. 600 (2004) | 13 |
| <u>Skjefstad v. Red Wing Potteries, Inc.</u> , 240 Minn. 38, 43, 60 N.W.2d 1 (1953) | 2 |
| <u>State v. Koenig</u> , 666 N.W.2d 366 (Minn. 2003) | 2 |
| <u>State v. Lender</u> , 266 Minn. 561, 124 N.W.2d 355 (1963) | 7 |
| <u>State v. Moseng</u> , 254 Minn. 263, 95 N.W.2d 6 (1959) | 3 |
| <u>State v. Newstrom</u> , 371 N.W.2d 525 (Minn. 1985) | 12 |
| <u>State v. Orsello</u> , 554 N.W.2d 70 (Minn. 1995) | 11 |

| | |
|---|------|
| <u>State v. Perry</u> , 725 N.W.2d 761 (Minn.Ct.App. 2007) | 10 |
| <u>State v. Robinson</u> , 539 N.W.2d 231 (Minn. 1995) | 13 |
| <u>State v. Simmons</u> , 280 Minn. 107, 158 N.W.2d 209 (1968). | 11 |
| <u>Walz v. Tax Comm’s of New York</u> , 397 U.S. 664 (1970) | 5, 6 |

Statutes and Rules

| | |
|------------------------------------|--------|
| Minn.Stat. § 595.02 | 7, 11 |
| Minn.Stat. § 609.341 | 11 |
| Minn.Stat. § 609.344 | passim |
| Minn.Stat. § 645.16. | 3, 10 |
| U.S. Const. Amend. I | 1, 9 |
| U.S. Const. Amend. V | 12, 13 |
| U.S. Const. Amend. XIV | 12, 13 |
| Minn. Const. Art. I § 7 | 12, 13 |
| Minn. Const. Art. I § 16 | 1, 9 |

LEGAL ISSUES ON APPEAL

- I. Whether Minn.Stat. § 609.344, subd. 1(1)(ii) is constitutional?

The district court did not rule on this issue.

The Court of Appeals held Minn.Stat. § 609.344, subd. 1(1)(ii) is constitutional.

ARGUMENT

I. MINNESOTA STATUTE § 609.344, subd. 1(l)(ii) IS UNCONSTITUTIONAL.

Respondent argues that Minn.Stat. § 609.344, subd. 1(l)(ii) is constitutional because it does not violate the First Amendment of the Constitution of the United States or Article I Section 16 of the Minnesota Constitution, and/or it is not unconstitutionally vague. For the reasons stated below and in Appellant’s Brief, Respondent’s arguments are erroneous.

A. Legislative History.

Respondent analyzes the legislative history of Minn.Stat. § 609.344, subd. 1(l)(ii), in support of its argument. Respondent argues that Minn.Stat. § 609.344, subd. 1(l)(ii), is intended to “outlaw sexual conduct stemming from the use of abuse of a position of power” and to “protect victims of clergy abuse by treating the clergy/counselee relationship in a manner similar to other protected situations.” [Respondent’s Brief at p. 23].

Respondent’s argument might have merit if that was the language Minn.Stat. § 609.344, subd. 1(l)(ii) used. Nowhere in Minn.Stat. § 609.344, subd. 1(l)(ii) do the phrases “position of power”, “clergy abuse”, or the “clergy/counselee” relationship appear.

Conversely, other sections of Minn.Stat. § 609.344 specifically include phrases such as “position of authority” (Minn.Stat. § 609.344, subd. 1(e)), “significant

relationship” (Minn.Stat. § 609.344, subd. 1(f), (g)), “former patient” and “emotionally dependent” (Minn.Stat. § 609.344, subd. 1(i)).

It is the statute as written that is enforced, not the legislative history. Skjefstad v. Red Wing Potteries, Inc., 240 Minn. 38, 43, 60 N.W.2d 1, 4 (1953) (Supreme Court cannot assume a legislative intent in plain contradiction to words used by legislature); Norris Grain Co. v. Nordaas, 232 Minn. 91, 109, 46 N.W.2d 94, 105 (1950) (Courts must interpret laws as they are, and neither their wisdom nor accuracy to accomplish desired purpose may be taken into consideration). And, ambiguities are construed in favor of defendants. State v. Koenig, 666 N.W.2d 366, 372-73 (Minn. 2003) (penal statutes are to be construed strictly so that all reasonable doubt concerning legislative intent is resolved in favor of the defendant).

Here, the only requirements for criminal liability to attach is that the sexual penetration must occur while the actor is a member of the clergy, or purporting to be, and during a period of time in which the complainant was meeting on an “ongoing” basis seeking “religious or spiritual advice, aid or comfort.” Minn.Stat. § 609.344, subd. 1(l)(ii).

The omission of those listed phrases in Minn.Stat. § 609.344, subd. 1(l)(ii), when they are included in other subsections of the exact same statute, shows an intent by the Legislature that there does not need to be a “qualifying relationship” in order to impose criminal liability. Respondent is essentially asking this Court to amend the statute to

include these phrases which the Legislature omitted. This Court has refused to perform such a function. See Minn.Stat. § 645.16; Metropolitan Sports Facilities Comm. v. County of Hennepin, 561 N.W.2d 513, 516-17 (Minn. 1997) (in construing statutes, the Supreme Court cannot supply that which the legislature purposely omits or inadvertently overlooks); State v. Moseng, 254 Minn. 263, 269, 95 N.W.2d 6, 11-12 (1959) (where failure of expression rather than ambiguity of expression is at issue concerning the elements of the statutory standard is the vice of the enactment, Courts are not free to substitute amendment for construction and thereby supply the omissions of the legislature).

Moreover, the lack of a “qualifying relationship” is further proof that Minn.Stat. § 609.344, subd. 1(l)(ii) was intended to single out and regulate the conduct of clergy, not regulate the conduct of other persons in “positions of authority.”

Finally, Respondent discusses that our Legislature needed to pass Minn.Stat. § 609.344, subd. 1(l)(ii) in order to include a separate section that specifically addressed members of the clergy and those performing “spiritual” counseling. [Respondent’s Brief at p. 25]. As previously argued, [Appellant’s Brief at p. 21-28], and as will be restated below, this specific targeting of clergy violates the First Amendment of the United States Constitution and Article I Section 16 of the Minnesota Constitution.

B. Minn.Stat. § 609.344, subd. 1(l)(ii) is Unconstitutional Because it Excessively Entangles Religion with State Law.

Respondent argues that Minn.Stat. § 609.344, subd. 1(l)(ii) does not violate the

Establishment clause because it does not excessively entangle religion with State law. For the reasons stated in Appellant's brief, and as will be more fully discussed below, Respondent's arguments are wrong.

1. Imbalance of Power.

As stated above, Respondent argues that Minn.Stat. § 609.344, subd. 1(I)(ii), is intended to protect victims who possess a "power imbalance" which negates consent in a manner similar to other protected situations. [Respondent's Brief at p. 29]. In support of its argument, Respondent relies on language from other subsections of Minn.Stat. § 609.344.¹

Again, Respondent's argument might have merit if that was what the language in Minn.Stat. § 609.344, subd. 1(I)(ii) provides. It does not. Indeed, nothing in Minn.Stat. § 609.344, subd. 1(I)(ii) requires a "position of power" or that a "clergy/counselee" relationship exist in order to impose criminal liability.

Yet, other sections of Minn.Stat. § 609.344 specifically require that there be a such an imbalance of power, Minn.Stat. § 609.344, subd. 1(e) (position of authority); Minn.Stat. § 609.344, subd. 1(f), (g) (significant relationship), Minn.Stat. § 609.344,

¹ Appellant notes that Dr. Gary Schoener's "expert" opinion on the power imbalance, proffered by the State in Trial I was rejected by the district court. [T V at p. 621 (Holton-Dimick)]. The State attempted to use Dr. Schoener as a "expert" as well in Trial II to show Appellant was giving the complainants psychotherapy. However, the district court refused to allow the State to amend the Complaint to include charges for engaging in sexual penetration while giving psychotherapy. [T V at p. 621-22 (Court)].

subd. 1(i) (former patient/emotionally dependent), in order to impose criminal liability.

The omission of these phrases in Minn.Stat. § 609.344, subd. 1(l)(ii), when they were specifically included in other subsections of the exact same statute, necessarily shows an intent by our Legislature to single out and regulate the conduct of clergy more than the conduct of other persons whom are in “positions of authority.”

As held by this Court in Odenthal, the entanglement doctrine is not violated if a statute is amenable to “neutral principles of law.” Odenthal v. Minn. Conference of Seventh-Day Adventists, 649 N.W.2d 426, 435 (Minn. 2002). A neutral principle of law is one that is “completely secular in operation.” Jones v. Wolf, 443 U.S. 595, 603 (1979).

Minn.Stat. § 609.344, subd. 1(l)(ii) is not a “neutral principal of law” and is not “completely secular in operation.” Minn.Stat. § 609.344, subd. 1(l)(ii) is specifically directed towards members of the clergy, or those purporting to be, and is only applicable to members of the clergy, or those purporting to be.

Minn.Stat. § 609.344, subd. (j) applies to any person whom is performing psychotherapy, and might apply to clergy irrespective of their status as clergy. However, Minn.Stat. § 609.344, subd. 1(l)(ii) applies to Appellant only because of his status as clergy.

Respondent argues that this premise has been rejected by the United States Supreme Court, [Respondent’s Brief at p. 29], and relies on Bowen v. Kendrick, 487 U.S. 589, 606-07 (1988), and Walz v. Tax Comm’s of New York, 397 U.S. 664, 668 (1970) to

support its argument. Neither of these cases are applicable here as neither dealt with criminal statutes that specifically targeted members of the clergy.

In Bowen, the U.S. Supreme Court found the Adolescent Family Life Act (“AFLA”) was constitutional on its face because there was (1) a secular purpose (prevention of teen pregnancy), (2) any effect of advancing religion was incidental, and (3) the distribution of grants would not excessively entangle religion with State law. Bowen, 487 U.S. at 617. The Court also relied upon the fact that although AFLA specifically allowed religious organizations to receive funds, it did not require a religious affiliation, and was applicable to wide range of non-secular organizations. Bowen, 487 U.S. at 608.

Here, unlike Bowen, Minn.Stat. § 609.344, subd. 1(1)(ii) applies only to members of the clergy, or those purporting to be. Thus, according to the Court’s analysis in Bowen, since Minn.Stat. § 609.344, subd. 1(1)(ii) is only applicable to clergy, or those purporting to be, it does not have a secular purpose and is unconstitutional.²

Additionally, Walz predated Lemon. Walz held that a tax exemption by the City of New York, pursuant to the New York State Constitution, did not violate the First Amendment because it neither advanced nor inhibited religion. Walz, 397 U.S. at 672. Since Appellant has conceded that Minn.Stat. § 609.344, subd. 1(1)(ii) neither advances

² It should be noted that the Court in Bowen remanded the case for a determination as to whether or not AFLA was unconstitutional “as applied.” Bowen, 487 U.S. at 620-21.

nor inhibits religion, Walz is unhelpful here.

2. Priest-Penitent Privilege.

Respondent, echoing our Court of Appeals decision in Doe v. F.P., 667 N.W.2d 493 (Minn.Ct.App. 2003) rev. denied., argues that Minn.Stat. § 609.344, subd. 1(1)(ii) does not excessively entangle religion with State law. Respondent's main argument is that Courts routinely look at communications which are arguably "religious or spiritual" in nature when examining whether or not a communication is protected by the priest-penitent privilege. Minn.Stat. § 595.02(c). While Courts do look at the priest-penitent privilege on a regular basis, the "who's" and "why's" in such an analysis is what renders the privilege a poor paradigm for use in the case at bar.

The priest-penitent privilege is a rule of evidence which determines whether or not a communication will be admitted as evidence. It is a rule that is narrowly applied. State v. Lender, 266 Minn. 561, 564, 124 N.W.2d 355, 358 (1963) (privileges are to applied more deliberately than other evidentiary rules because they suppress otherwise admissible evidence). It is not a criminal statute which imposes incarceration if it has been violated.

More importantly, the application of the priest-penitent privilege in a specific case is determined by a legally trained professional, a judge, who is also an impartial third-party. If applicable, this rule specifically excludes "religious or spiritual" communications from being considered by the fact-finder. But, here, the issue of whether there has been religious or spiritual abuse is determined by a jury.

After all, the provision of “religious or spiritual advice, aid or comfort” is an essential element of the offense, and as such, the jury must determine whether or not such communication occurred. Appendi v. New Jersey, 530 U.S. 466, 477 (2000) (a criminal defendant is entitled to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt). Minn.Stat. § 609.344, subd. 1(1)(ii) specifically requires juries to identify the conduct involved and make a determination whether or not the defendant gave “religious or spiritual advice, aid or comfort.” Such a determination is necessarily entangling.

The difference between a rule of evidence, narrowly applied by a legal professional to prevent admission of evidence, and an essential element of an offense, applied and found by a jury of lay persons seems manifest. Such a difference explains why the logic of Doe v. F.P., is not persuasive here.

3. Testimony of McDonough and Willerscheidt.

Respondent argues that the testimony of Fr. Kevin McDonough and Phyllis Willerscheidt did not excessively entangle religion because neither testified as to doctrinal content. [Respondent’s Brief at p. 33]. The record does not support the State’s claim.

Although Fr. McDonough and Ms. Willerscheidt did not teach a seminar on Canon Law, they did testify as to what the Roman Catholic Archdiocese of St. Paul and Minneapolis considers pastoral care, counseling, manipulation, and exploitation. [T VI at p. 715-16, 723, 727-28, 745-46 (McDonough); T VI at p. 812 (Willerscheidt)]. This was

improper.

The entanglement doctrine prohibits a state from “inquir[ing] into or review[ing] the internal decisionmaking or governance of a religious institution.” Odenthal, 649 N.W.2d at 435 (citing Jones, 443 U.S. at 602). Why else would Fr. McDonough preface his testimony with the services and procedures the Catholic Church provides, and the training priests undergo? [T VI at p. 708-19, 723-24, 727-28, 745-46 (McDonough)]. And, why else would the district court allow Fr. McDonough’s testimony to show the complainants followed Archdiocese policy? [T VI at p. 745 (McDonough)].³

For the reasons stated above, Minn.Stat. § 609.344, subd. 1(l)(ii) violates the First Amendment of the United States Constitution and Article I Section 16 of the Minnesota Constitution.

C. Void-for-Vagueness.

Respondent argues that Minn.Stat. § 609.344, subd. 1(l)(ii) is not unconstitutionally vague, and the facts of this case are specifically applicable to the statute because Appellant used his position to overcome the “victims’ scruples at betraying their spouses and violating the sixth of ten commandments recognized by their

³ At sidebar the district court allowed Ms. Willerscheidt to testify to show that the complainants or Ms. Willerscheidt followed church policy in reporting the incidents and what remedial steps were taken. This was not a sex discrimination suit where such testimony may be relevant. See e.g. Continental Can Co. v. State, 297 N.W.2d 241, 249 (Minn. 1980).

religion.” [Respondent’s Brief at p. 38].⁴ Appellant is confused at to how a violation of the Ten Commandments, an obvious religious reference, is constitutionally relevant to whether or not criminal sanctions should be imposed upon a person.

Respondent argues that the statute is applicable here because Appellant was giving the two complainants religious counseling while he was engaging in sexual penetration with them. [Respondent’s Brief at p. 38-39]. Whether or not the evidence was sufficient to support Appellant’s conviction is not at issue here, vagueness is.

Further, Respondent argues that Appellant’s argument is without merit because the language of Minn.Stat. § 609.344, subd. 1(l)(ii) is not vague and is sufficiently specific to pass constitutional muster. Respondent is incorrect.

First, Respondent argues that “ongoing” simply means the “clergy/counselee relationship.” [Respondent’s Brief at p. 41-42]. As stated above, nowhere in the statute are these terms included. Other subsections of Minn.Stat. § 609.344 include phrases which require their to be some specific type of relationship in order to impose criminal liability. And, such an argument would render “ongoing” superfluous. See Minn.Stat. § 645.16; In re Estate of Jotham, 722 N.W.2d 447, 454 (Minn. 2006) (no word or phrase should be deemed superfluous or insignificant); State v. Perry, 725 N.W.2d 761, 764-65

⁴ Appellant is unsure if Respondent is suggesting that there would be no violation if the victim had belonged to a religious sect which did not view adultery as a sin. Irrespective, Respondent here makes as strong an argument for entanglement as does Appellant above.

(Minn.Ct.App. 2007).

Minn.Stat. § 609.344, subd. 1(I)(ii) does not have any qualifying language such as “position of authority”, “significant relationship”, “former patient” or “emotionally dependent.” Where those phrases are used, they have been specifically defined by the Legislature. Minn.Stat. § 609.341, subd. 10, 15. “Ongoing” is not defined, and that is the problem.

The lack of these phrases in Minn.Stat. § 609.344, subd. 1(I)(ii) means that criminal liability attaches to almost any situation where a member of the clergy, or one purporting to be, engages in sexual penetration. The only exception being where the sexual penetration occurred while the complainant was married to the actor. Minn.Stat. § 609.344, subd. 1(I)(ii).

Next, Respondent argues that “religious or spiritual advice, aid or comfort” is not vague because Minnesota Courts have interpreted this phrase as applied to Minn.Stat. § 525.02(c) (priest-penitent privilege), and those interpretations are relevant here.

[Respondent’s Brief at p. 43].

As stated above, the priest-penitent privilege is a rule of evidence, not a criminal statute. Criminal statutes are to be interpreted in favor of the defendant. State v. Orsello, 554 N.W.2d 70, 76 (Minn. 1995). And, it is elementary that in order for a criminal statute to be constitutional it must be “sufficiently definite to inform a person of ordinary intelligence what it is that the statute compels or prohibits.” State v. Simmons, 280 Minn.

107, 110, 158 N.W.2d 209, 211 (1968). After all, if the relationship is not ongoing, there is no crime.

Courts are required to interpret the language of a criminal statute more narrowly than rules of evidence that uses similar phrases. Thus our Legislature needs to specifically define essential elements of the crime to ensure that the language is not interpreted so broadly that it makes activities criminal which are not intended to be. Not surprisingly, here, the jury asked the district court for permission to use a dictionary to look up this term, which the district court denied. [T X at p. 1528 (Court)].

Criminal statutes also must meet the due process standard of definiteness under both the United States Constitution and the Minnesota Constitution. State v. Newstrom, 371 N.W.2d 525, 528 (Minn. 1985); U.S. Const. Amend. V, XIV; Minn. Const. Art. I § 7. Statutes that do not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited violates a defendant's constitutional right to due process of the law. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

Finally, Respondent argues that the statute is not unconstitutional "as applied to" Appellant because this case fits specifically within the requirements of Minn.Stat. § 609.344, subd. 1(l)(ii), and Appellant should not be able to make a "facial" challenge to the statute. [Respondent's Brief at p. 40]. Respondent is incorrect as case law is clear that a defendant can bring an "as applied to" challenge, as well as a facial challenge. See

Bowen, 487 U.S. at 602, 618-19.

This statute is unconstitutional as applied to Appellant, because the jury could not determine what an essential element of the offense meant. [T X at p. 1528 (Court)]. This alone seems to show that when applying this statute to real world situations, persons of common intelligence were forced to guess as to the meaning of this term, which renders it unconstitutionally vague. State v. Robinson, 539 N.W.2d 231, 237 (Minn. 1995); U.S. Const. Amend. V, XIV; Minn. Const. Art. I § 7.

Additionally, although Respondent argues that facial challenges are to be discouraged, the United States Supreme Court has recognized the “validity of facial challenges alleging overbreadth,” although they have not necessarily used that term. Sabri v. United States, 541 U.S. 600, 609-10 (2004). For the reasons stated above, there are several essential elements of the crime which are not specifically defined by our Legislature, which are so vague as to render the statute unconstitutional.

Since Minn.Stat. § 609.344, subd. 1(l)(ii) does not include the specific and defined phrases of other subsections of Minn.Stat. § 609.344, its application is so broad as to cover any situation in which a member of the clergy, or one purporting to be, engages in sexual penetration with someone whom is not their spouse. This overbreadth renders Minn.Stat. § 609.344, subd. 1(l)(ii) unconstitutionally vague.

For the reasons stated above, and in Appellant’s brief, Minn.Stat. § 609.344, subd. 1(l)(ii) is unconstitutionally vague.

CONCLUSION

For the reasons state above, and in Appellant's brief, Appellant respectfully requests this Court find Minn.Stat. § 609.344, subd. 1(I)(ii) unconstitutional and reverse his convictions.

Dated: February 21, 2007

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