

[Cite as *State v. Christian*, 2017-Ohio-9420.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO |) | CASE NO. 16 JE 0030 |
| |) | |
| PLAINTIFF-APPELLEE |) | |
| |) | |
| VS. |) | OPINION |
| |) | |
| WAYNE CHRISTIAN |) | |
| |) | |
| DEFENDANT-APPELLANT |) | |

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| CHARACTER OF PROCEEDINGS: | Criminal Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 06 CR 79 |
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| JUDGMENT: | Affirmed. |
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APPEARANCES:

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| For Plaintiff-Appellee: | Atty. Jane M. Hanlin Prosecuting Attorney Jefferson County Justice Center 16001 State Route 7 Steubenville, Ohio 43952 No Brief Filed |
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| For Defendant-Appellant: | Wayne Christian, <i>Pro se</i> #521-627 Trumbull Correctional Institution 5701 Burnett Road P.O. Box 901 Leavittsburg, Ohio 44430 |
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JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: December 27, 2017

{¶1} Appellant Wayne Christian appeals an October 26, 2016 Jefferson County Common Pleas Court judgment entry denying his “Motion for Declaratory Judgment.” Appellant argues that a statute criminalizing sexual conduct between a person with knowledge of their human immunodeficiency virus (“HIV”) status and a person under the age of eighteen amounts to a violation of equal protection. Pursuant to *State v. Batista*, -- Ohio St.3d --, 2017-Ohio-8304, -- N.E.3d --, Appellant’s arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On June 7, 2006, Appellant was indicted on ten counts of felonious assault, a felony of the second degree in violation of R.C. 2903.11(B)(3). The statute criminalizes sexual conduct between a person who has knowledge of their HIV status and a minor, defined as a person under the age of eighteen. Appellant was charged with engaging in sexual conduct with a sixteen-year-old girl on at least ten occasions without informing her that he is HIV positive and without using protection.

{¶3} Appellant was convicted on nine of the ten counts by a jury. On May 17, 2007, Appellant was sentenced to eight years of incarceration per count. Counts one, three, four, five, and six were ordered to run consecutively while the remaining counts were ordered to run concurrently. In the aggregate, Appellant was sentenced to forty years of incarceration. The trial court terminated Appellant’s postrelease control from a prior case and imposed a mandatory five-year postrelease control

period. The court gave him 199 days of jail time credit. Appellant was also declared a sexual predator in accordance with R.C. 2950.01.

{¶4} We affirmed Appellant's convictions and sentences in *State v. Christian*, 7th Dist. No. 07 JE 9, 2007-Ohio-7205. Following his direct appeal, Appellant has filed several motions in the trial court. At issue here is the trial court's denial of Appellant's "Motion for Declaratory Judgment." We note that Appellant filed a "Motion for Leave to File Addendum to Merit Brief" with this Court on October 20, 2017 seeking to address a recent California law updating California's HIV laws. We denied his motion.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN DISMISSING DEFENDANT-APPELLANT'S MOTION FOR DECLARATORY JUDGMENT WITHOUT MAKING A DETERMINATION AS TO THE CONSTITUTIONALITY OF R.C. 2903.11(B)(3).

ASSIGNMENT OF ERROR NO. 2

R.C. 2903.11(B)(3) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 2, ARTICLE I OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. 3

BECAUSE R.C. 2903.11(B)(3) IS UNCONSTITUTIONAL, DEFENDANT-APPELLANT'S CONVICTIONS FOR NINE COUNTS OF FELONIOUS ASSAULT UNDER THAT STATUTE ARE VOID.

{¶5} “The Equal Protection Clause prevents states from treating people differently under its laws on an arbitrary basis.” *In re Chappell*, 164 Ohio App.3d 628, 2005-Ohio-6451, 843 N.E.2d 823, ¶ 13 (7th Dist.), citing *State v. Williams*, 88 Ohio St.3d 513, 530, 728 N.E.2d 342 (2000); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (Harlan, J., dissenting).

{¶6} In each of Appellant's three assignments of error, he presents both facial and as applied constitutional challenges to R.C. 2903.11(B)(3). As to the facial challenges, Appellant argues that the statute unfairly criminalizes sexual conduct with a person under eighteen years of age without considering whether the offender disclosed his HIV status and without requiring actual transmission of the disease to the victim.

{¶7} Appellant also argues that there is no rational basis for the statute for three reasons. First, he argues that HIV is not the only deadly sexually transmitted disease (“STD”), yet it is the only one included within the statute. Second, he argues that there have been significant medical advances in the treatment of HIV and the actual risk of transmission is low. Third, he argues that the statute infringes on his right to procreate, which he asserts is a fundamental right. In making these arguments, Appellant relies on laws from other states.

{¶8} The state failed to file a response brief in this matter.

{¶9} Pursuant to R.C. 2903.11(B)(3), “[n]o person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly * * * Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.”

{¶10} “The federal Equal Protection Clause does not forbid classification, but it requires that different treatment be related to the purpose of the law.” *Batista, supra*, at ¶ 23, citing *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 24. “So long as the laws are applicable to all persons under like circumstances and do not subject individuals to an arbitrary exercise of power and operate alike upon all persons similarly situated, it suffices the constitutional prohibition against the denial of equal protection of the laws.” *Chappell, supra*, at ¶ 14, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 288–289, 595 N.E.2d 862 (1992).

The test used in determining whether a statute is constitutional under the Equal Protection Clause depends upon whether a fundamental interest or suspect class is involved. “Under the equal protection clause, in the absence of state action impinging on a fundamental interest or involving a suspect class, a rational basis analysis is normally used. Where the traditional rational basis test is used great deference is paid to the state, the only requirement being to show that the differential treatment is rationally related to some legitimate state interest.”

Chappell, supra, at ¶ 35, citing *State ex rel. Heller v. Miller*, 61 Ohio St.2d 6, 11, 399 N.E.2d 66 (1980); *Conley v. Shearer*, 64 Ohio St.3d 284, 289, 595 N.E.2d 862 (1992).

{¶11} There exists a rebuttable presumption that a statute is constitutional, until it is shown beyond a reasonable doubt that the statute in question violates a constitutional provision. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 352, 639 N.E.2d 31 (1994).

{¶12} Appellant first argues that R.C. 2903.11(B)(3) is unconstitutional because it criminalizes sexual conduct without considering whether the offender disclosed his HIV status. The instant statute applies only to a certain classification: individuals who know they are HIV positive and engage in sexual conduct with a minor. Although the state did not file a brief, it is readily apparent that the state's interest in this matter is the protection of minors.

{¶13} The Ohio Supreme Court has addressed whether the state holds a valid interest in protecting minors. See *Mole, supra*. The statute in *Mole* criminalized sexual conduct between a police officer and a minor. Although the statute differs from the one at issue, it does provide guidance as to whether the government has a legitimate interest in protecting minors. Similar to R.C. 2903.11(B)(3), the statute in *Mole* defined a minor as an individual under the age of eighteen.

{¶14} While the *Mole* Court found that the statute's differential treatment of police officers was based on an irrational classification, the Court also held that "[t]here is no dispute that the government has a legitimate, compelling interest in

protecting the mental, emotional, and physical well-being of minors.” *Id.* at ¶ 53. “Whether articulated as a general interest in protecting minors, or more specifically as an interest in protecting minors from sexual exploitation by those with special access to them or an authoritative relationship over them, the legitimacy of this interest is clear.” *Id.* at ¶ 54.

{¶15} To the extent the *Mole* Court disagreed with the classification, it was based on the fact that it applied to police officers instead of, more broadly, all persons having authority over minors. We recognize that there were no allegations in this case that Appellant was an authority figure to the minor. Nevertheless, the *Mole* Court does reinforce the determination that statutes directed toward the protection of minors are based on legitimate state interest.

{¶16} As to Appellant’s argument regarding the existence of other dangerous STDs that are not included within the statute’s prohibition, the Ohio Supreme Court recently considered this argument in *Batista, supra*. Although *Batista* addressed subsection (B)(1) of the statute and not (B)(3), its rationale is equally applicable to both. The *Batista* Court determined that “the existence of other sexually transmitted diseases that may have serious public health and safety consequences does not eliminate the rational relationship between the classification here—individuals with knowledge of their HIV-positive status who fail to disclose that status to sexual partners—and the goal of curbing HIV transmission.” *Id.* at ¶ 24. Similarly, the existence of other STDs that may have serious public health and safety

consequences does not eliminate the rational relationship between the classification and the goal of protecting minors.

{¶17} Appellant contends that significant advancements have been made in the treatment of HIV and that studies have shown that the actual risk of transmission is low. This was also addressed in *Batista*, where the Court stated,

We recognize that there have been advancements in the treatment of individuals with HIV that may have reduced the transmission and mortality rates associated with the disease. However, we cannot say that there is no plausible policy reason for the classification or that the relationship between the classification and the policy goal renders it arbitrary or irrational.

Id. at ¶ 26. The Court noted that “[s]exual conduct remains one of the methods by which HIV is transmitted.” *Id.* at ¶ 25. Thus, even if Appellant is correct that the possibility of transmission is low, the Ohio Supreme Court has acknowledged that sexual conduct remains a method of transmission and Appellant’s contention does not affect the rational relationship between the classification and state interest. Any medical advancements in the treatment and transmission of HIV do not affect the rational relationship between the classification and the goal of protecting minors.

{¶18} Appellant asserts that the statute violates his fundamental right to procreate, raising the level of review to strict scrutiny. Before addressing the obvious flaw in this assertion, even if we were to apply a strict-scrutiny test, the same result occurs. Under a strict-scrutiny analysis, “a discriminatory classification [must] be

narrowly tailored to serve a compelling state interest.” *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 13. As noted in Justice DeWine’s concurring Opinion, an offender’s sexual partner is entitled to make a decision involving consent, particularly when that partner is exposed to the risk of HIV transmission. *Batista* at ¶ 33-34. We note that in most statutes that place minors in a special classification involving sexual conduct or contact, most often it is because of the impaired ability of the minor to give knowing consent.

{¶19} Appellant relies on cases involving sexual conduct between same sex individuals in order to argue that this statute serves no state interest. However, this matter is more akin to cases involving statutory rape. Similar to statutory rape, the instant statute criminalizes only sexual conduct that involves a statutorily defined minor. Appellant obviously retains his right to procreate, so long as his partner is not among a specific group of individuals (minors) the state has determined lack the ability to knowingly consent. Because this statute only involves a statutorily defined minor, presumed legislatively to be unable to provide consent, the state’s interest is apparent.

{¶20} Appellant further argues that the statute is unconstitutional as applied to him. He argues that his risk of transmission has decreased, because he was taking medication at the time of the offense. We note that Appellant has not provided any evidence to support his claim. Regardless, while his medication may lower the transmission risk, it does not eliminate the possibility of transmission, altogether.

Appellant also asserts that the use of a condom reduces the risk of transmission, however, the record reveals that he did not use a condom at the time he offended.

Conclusion

{¶21} Appellant argues that a statute criminalizing sexual conduct between a person with knowledge of their HIV status and a person under the age of eighteen is unconstitutional because it results in a violation of equal protection. Pursuant to *Batista, supra*, Appellant's argument is without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.