Sex With Mannequin Conviction Tossed

The South Dakota Supreme Court unanimously ruled in November 2007 that a young man having sex with a mannequin in a closed room with no one else present does not violate the state's indecent exposure law. The following are excerpts from the Court's decision in *State v. Horse*, 2007 S.D. 114 (S.D. 11/07/2007).

In the late afternoon of November 14, 2005, Michael James Plenty Horse was walking to the YMCA in Sioux Falls, South Dakota. On his way, he stopped by the Washington Pavilion of Arts and Sciences and ventured upstairs. Shortly afterwards, he was surprised by a security guard in the Alumni Room, a small third-floor space containing high school mementos and photos honoring students who had attended Washington High School. There were no other persons in the area at the time. The guard found Horse lying on top of a mannequin, with its band uniform partially removed. It appeared that Horse was having simulated intercourse. Horse was clothed, but his pants were partially down, and a wad of paper was in his hand. Horse rolled off the mannequin, turned away, and began adjusting his pants. Horse was told to remain where he was, and the police were called. The guard had walked upon this scene because he noticed that the door to the room was closed. This door, according to the guard, was to be left open and, to his knowledge, had only been closed three times in the three years he had worked there. When the guard opened the door and walked in the room, the lights were off. [¶2.]

When questioned about what he was doing, Horse, visibly ashamed, declined to talk about it. A low functioning nineteen-year old, defendant has been classified as a high school sophomore for the past three years. His reading comprehension remains at the level of a fourteen-year old; his math skills, that of an eight-year old; and his written language, that of a thirteen-year old. With more questioning, he finally admitted that because he had not seen his girlfriend in a year his needs had not been met. He worried about what would be told to his mother. [¶3.]

Horse was charged with indecent exposure under SDCL 22-24-1.2 (2005), a class one misdemeanor. A court trial was held before a magistrate, who found Horse guilty. He was granted a suspended imposition of sentence and placed on supervised probation for three years. With this conviction, Horse must register as a sex offender. His appeal in circuit court was affirmed. Horse appealed to the state Supreme Court, asserting that there was insufficient evidence to convict him of indecent exposure under the statute. [¶4.]

Analysis and Decision

A person commits the crime of indecent exposure if, with the intent to arouse or gratify the sexual desire of any person, the person exposes his or her genitals in a public place under circumstances in which that person knows that person's conduct is likely to annoy, offend, or alarm another person. Clearly, the "with the intent to" language proclaims that indecent exposure should be defined as a specific intent crime. [¶6.]

Because this is a specific intent crime, the prosecution must link the exhibition of one's genitals to the intent to seek sexual gratification by such public exposure. Thus, it must be proved that the offender exhibited or displayed his genitals with the intent of arousing himself or someone else. [¶7.]

Although Horse had the observable intent to sexually gratify himself, no evidence demonstrated that he intended to arouse or gratify his (or someone else's) sexual desire by the act of exposing his genitals in public. On the contrary, while he was alone and the lights were off, defendant closed the door and went over by a desk. It was late in the afternoon, near to closing time, and no other patrons were in the area. Nothing establishes that his conduct was done with the specific intent to generate sexual arousal or gratification by the act of publicly exposing, i.e., displaying or offering to the public view, his genitals. Therefore, defendant's act, lewd though it may have been, does not fall within the purview of the indecent exposure statute. [¶9.]

Reversed. [¶10.]

John Spirko's Sentence Commuted To Life In Prison

John Spirko's story of being on Ohio's death row when there is compelling evidence he was over 100 miles from the scene of Elgin, Ohio Postmistress Betty Jane Mottinger's 1982 abduction and murder, was in *Justice:Denied* Issue 27, Winter 2005.

Beginning in November 2005, two Ohio governors granted seven stays of execution at the request of Ohio's Attorney General so that state-of-the-art DNA tests unavailable at the time of Spirko's 1984 trial could be conducted on evidence in the case. After more than two years of DNA testing hundreds of items of crime scene evidence, no DNA link could be established between Spirko and the crime scene or Mottinger's murder.

With Spirko's seventh stay of execution scheduled to expire on January 16, 2008, and no more evidence to test that could possibly inculpate Spirko in the crime, on January 9, 2008 Ohio Governor Ted Strickland commuted Spirko's death sentence to life in prison without the possibility of parole.

Governor Strickland acted in response to a Clemency Application submitted by Spirko's lawyers on October 2005 that sought a full pardon and the release of Spirko after more than 20 years on Ohio's death row. The pardon request was based on the fact that there is no physical, forensic or eyewitness evidence tying Spirko to Mottinger's murder, and Spirko has the unrebutted alibi of being in the Toledo area more than 100 miles from the crime scene. Spirko's alleged accomplice, Delaney Gibson, was never tried, and there is testimonial and photographic evidence that on the entire day of the crime Gibson was in Asheville, North Carolina, more than 500 miles from where Mottinger was abducted.

In December 2007 Spirko's lawyers pressed Governor Strickland to act on the clemency application, writing in a letter that the evidence as it exists today "can lead only to the conclusion that Mr. Spirko is an innocent man. Mr. Spirko has already spent 25 long and hard years in prison . . . for a crime he did not commit. He is 61 years old, and he cannot, and certainly should not, wait any longer for this injustice to be addressed."

The governor conceded in his January 9, 2008 commutation statement that there is a "lack of physical evidence linking Mr. Spirko" to Mottinger's murder, and that there is "residual doubt about his responsibility for the murder arising from a careful scrutiny of the case record and revelations about the case over the past 20 years." However, in spite of the overwhelming evidence of Spirko's factual innocence, Governor Strickland's sentence commutation avoided the negative publicity that would have followed pardoning Spirko and his release from prison.

Sources:

Governor's Statement Regarding Clemency Application of John G. Spirko, Columbus Ohio, January 9, 2008.
Application For Executive Clemency For John G. Spirko Jr., October 7, 2005.
Case Based On A "Foundation Of Sand" Enough To Send Man To Death Row - The John Spirko Story, *Justice:Denied*, Issue 27, Winter 2005.