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## 75 Years for Poz Man's Unprotected Sex With Gay Teen Upheld

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# 75 Years for Poz Man's Unprotected Sex With Gay Teen Upheld

## Mississippi appeals court concludes trial judge's lengthy diatribe does not prove bias

BY ARTHUR S. LEONARD

**O**n April 19, the Court of Appeals of Mississippi affirmed a 75-year prison sentence for Timothy Allen McCoy, who was convicted of four counts of sexual battery and one count of exposing another to HIV.

McCoy did not argue on appeal that he did not engage in the conduct charged against him, but he claimed that the trial judge was biased, resulting in an excessive sentence, and that the evidence did not support his conviction.

Judge Jim Greenlee wrote for the unanimous appeals court panel of nine judges.

According to McCoy, the teenage boy, who is identified in the court's opinion as "G.G.," contacted him on a social-networking website for gay men. They chatted back and forth online before deciding to meet in person. McCoy was 41 at the time and the boy said in his trial testimony that he was then 15.

G.G. gave McCoy the address of his father's house near Decatur and arranged for McCoy to pick him up at 2 a.m. G.G. "sneaked out" and got into McCoy's car. McCoy drove them to a secluded spot where they had sex. According to G.G., McCoy said nothing about being HIV-positive, said he was 34 years old, and did not use condoms. They had oral and anal sex and were together less than an hour before McCoy drove G.G. back to his father's house.

G.G. testified that this encounter occurred in mid-April 2012, but he could not remember the exact date. McCoy testified that it took place in late July, which was shortly after G.G.'s 16th birthday. He also testified that he told G.G. that he was HIV-positive, that G.G. had consented to having sex with a condom, and that when they met G.G. told McCoy he was 18.

G.G.'s mother testified that she became concerned about G.G.'s behavior and began looking at his phone and phone records on Mother's Day in May 2012. According to Greenlee's opinion, she turned the

"naked pictures of men and sexually explicit text messages" over to police, who issued a warrant for McCoy's arrest in September, after he was identified from the phone records. He agreed to give a voluntary statement without speaking to an attorney, probably because he believed he had done nothing wrong. This is almost always a mistake.

Police testified that McCoy admitted to the details of the encounter and that he was HIV-positive and had not used condoms.

The court's opinion says nothing about whether G.G. became infected with HIV as a result of this incident or about McCoy's viral load or treatment history. It also does not indicate whether there was any testimony about how HIV is and is not transmitted.

The jury convicted McCoy on all counts. Judge Marcus D. Gordon sentenced him to a total of 75 years on the battery counts and 10 years on the HIV exposure count, to run "concurrently." Given McCoy's age, this is virtually a life sentence, but he was also required to register as a sex offender and pay a \$10,000 fine.

McCoy argued that Gordon expressed a personal prejudice against his sexual orientation resulting in an unduly harsh sentence and asked that the court re-assign the case to a new judge for re-sentencing. The court of appeals included extensive quotations from the transcript of the sentencing hearing that were offered by McCoy as evidence of prejudice.

According to the trial transcript quoted in the appeals court's opinion, Gordon said, "Well, Timothy Allen McCoy, I consider myself a normal person, and I don't understand fully what you have — you yourself have testified that you are homosexual, that you are attracted to someone for physical activities. I want you to tell me why is it that you as a 41-year-old man was [sic] attracted to a 15-year-old boy for sexual activity?"

McCoy replied, "At the time, sir, I did not know that he was 15."

"How old did you think he was?"

asked Gordon.

"He said he was 18," responded McCoy.

"All right. That is still a minor child in my opinion," said Gordon, despite the fact that the age of consent in Mississippi is 16.

"Yes, sir, I understand," said McCoy.

"Why is it that you was [sic] attracted to him?"

"I can't answer that, sir," replied McCoy.

The judge later said, "You know that that type of activity was wrong, did you not? That a 41-year-old man should not have sex with a person, a male person, who is either 15 or 18? You knew it was wrong to have sex with an 18-year-old person or a 15-year-old person, did you not?"

"Yes, sir."

"Why did you do it?"

"I don't know at the time, sir. Actually, Your Honor, I had a — I guess — a drug problem at the time. I was on Lortab."

"That's an excuse, not a justification," said Gordon.

If Gordon was suggesting that it would be illegal for McCoy to have sex with an 18-year-old boy, as McCoy claimed G.G. had represented himself to be, the judge would be in error. At the same time, courts have consistently ruled that because age of consent laws are intended to protect minors from sexual exploitation by adults, a minor's misrepresentation of their age is irrelevant to the guilt or innocence of the defendant.

Following this exchange, Gordon engaged in a rambling diatribe, telling McCoy, "In reviewing your activities, I refer again to the sentencing statute, and my thoughts regarding sentences are controlled by the fact that you have some education, including some education in college, and that you as an adult man, 41 years old, with your background, knowing what's involved with you having sex with a minor person, that you joined with that young fellow, not knowing him, and taking him in your car and driving a short distance to a dirt road with a strange person

and having anal sex and fellatio at a time when you had HIV, knowing what you were doing, knowing that this was a minor child, soliciting him to a wrongful act, an act that shocks the conscience of people of this country, that you would do that to a minor child, causing that child possibly to live a life such as you. He will have this life for the remainder of his life. Perhaps, he will become a person as you because he has had now we know, I know, a sexual experience which, if you want to call it sexual... He has that life. Perhaps, he will not have a job, and perhaps he will be ridiculed and not likely he'll be accepted in the general society as you are not accepted in generally accepted... He will live a life in seclusion."

In opposing McCoy's appeal of the sentence, the state argued that the judge's comments were not "sufficient to overcome the presumption that he was unbiased and impartial."

The court of appeals agreed.

Greenlee wrote that McCoy's contention that the judge was biased was based on "mere speculation." He pointed out that the judge explicitly relied on "multiple aggravating factors," including G.G.'s actual age, McCoy's "admission" to the police that he was HIV-positive and had not used condoms, the secretive nature of the 2 a.m. meeting, and the "secluded spot on a dirt road" where the encounter took place. It seems, as well, that McCoy had a police record, including four misdemeanor charges or convictions in Georgia between 1990 and 2001, one involving "enticing a minor."

Greenlee also pointed to the consistent practice of Mississippi appellate courts in upholding sentences trial courts impose as long as they fall within the limits prescribed by the sentencing statute. On four sexual battery counts, the appeals court noted, McCoy was exposed to a potential sentence of up to 130 years, so 75 was well under the statutory maximum and

► MISSISSIPPI, continued on p.15

the court concluded that bias had not been shown.

The appeals court refused to address McCoy's argument that his trial lawyer had not provided effective representation, since he was appealing his sentence and not his conviction. McCoy faulted his attorney for not getting the case dismissed based on he grounds that G.G. had turned 16 by the time the two had sex, but the appeals court noted that the attorney had in fact made that argument in asking for a directed verdict of not guilty.

The appeals court, taking note of extensive disagreement among McCoy, G.G., and the youth's mother about when the sex took place, found that a jury could have resolved the conflict in favor of the prosecution.

The jury could also resolve conflicting testimony about whether McCoy told G.G. he was HIV-positive and whether condoms were used, the appeals court found.

Finally, responding to McCoy's contention that his sentence was disproportionate to the seriousness of the crime, the court quoted a US Supreme Court decision to the effect that sentences "that do not exceed the maximum punishment allowed by statute will not be considered grossly disproportionate and will not be disturbed on appeal."

McCoy was represented on appeal by attorneys from the Office of the State Public Defender, George T. Holmes and Justin Taylor Cook, and participated actively in his own defense. He could attempt to appeal this ruling further to the State Supreme Court, which is not a notably gay-friendly bench. It appears that McCoy may spend the rest of his life in prison for a brief fling with a boy who said he was 18 when they met, during which HIV was not transmitted. McCoy is not claiming that he is innocent, just that the sentence is excessive in light of how things turned out.

► STONEWALL, from p.13

Scott Caplan, of the Jim Owles Liberal Democratic Club, said the story of Stonewall must also include the account of "oppression by the NYPD." It was a police raid, after all, that sparked Stonewall's patrons to fight back.

Transgender activist Josephine Fantasia Perez, who described herself as a daughter of Sylvia Rivera and niece of Marsha P. Johnson, two early transgender street activists of the Stonewall Era, made an impassioned plea about the life and death burdens that continue to weigh on transgender people.

"Give them a safe place," Perez said. "Too many of us are homeless. There are too few jobs and job training programs. Educate parents so that they don't throw their transgender kids out into the street." She and other transgender witnesses, such as Mariah Lopez, argued that the Hudson River pier in the West Village, home over the years to many transgender homeless people, should also be part of a national park.

NPS Director Jarvis told the audience at the hearing's conclusion, "I heard unanimous support. My job is to recommend to Secretary Jewell and her job is to recommend to

President Obama that the Stonewall should join the Statue of Liberty and the Grand Canyon" as a national park, not just in recognition of the history of the Rebellion and the role the streets outside the Stonewall played in moments of both trauma and celebration for the community, but to highlight the "continued struggle" for LGBT rights.

Interior Secretary Jewell, who listened attentively but did not speak during the testimony, told Gay City News afterward that she heard "community support for telling an important civil rights story," something she earlier said the 100-year-old National Park Service, as "America's storyteller," excels at.

Historian David Carter, author of "Stonewall: The Riots that Sparked the Gay Revolution," widely considered a definitive account, sounded a cautionary note about storytelling — the importance of the Park Service settling on the facts of what happened and who was there in June 1969 before assuming the mantle of authority.

"Insist on the same level of evidence and the careful examination of evidence for this event that we expect for any other important event in our nation's history," Carter urged.

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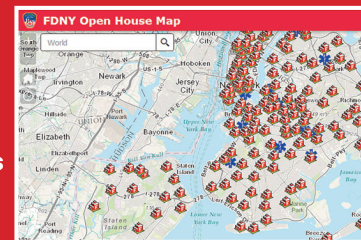
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