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Criminal Litigation - Notes (April 2022)

Arthur S. Leonard

problems, Judge Copenhaver's opinion does not provide a detailed exposition of the facts, instead focusing on some specific criticisms that Kerr made of the magistrate's conclusions and, in the event, rejecting them. "The action arises out of an alleged discriminatory, retaliatory, and defamatory campaign by DHHR, McKay, and Whaley [the co-defendant supervisors] against Kerr stemming from a 'distaste for non-gender-conforming lesbians' like her." Wrote Copenhaver. A prior ruling by the court had reduced her causes of action to sex discrimination and retaliation under Title VII and defamation under West Virginia common law. She sued in state court, but one of the defendants removed to federal court based on the Title VII claim. Kerr's affidavit alleged that the various factual assertions by defendants in support of their actions were pretextual, noting instances where other employees similarly at fault (in her view) were not reprimanded or disciplined when she was, while the defendants rely on assertions of "multiple" complaints from other agencies about difficulties of working with Kerr beyond the specific incidents cited in the record. However, wrote the judge, "Kerr does not appear to contest that she had a lengthy record of unprofessional conduct – precisely the nature of her conduct for which McKay reprimanded her over the vehicle argument." The court found that Kerr's objections were without merit and adopted the magistrate's proposed findings and recommendation. Judge Copenhaver was appointed by President Gerald Ford.

WISCONSIN – Assuming without deciding that the ban on sex discrimination under the federal Fair Housing Act extends to sexual orientation discrimination claims (with a cf. citation to *Bostock v. Clayton County*), U.S. District Judge William M. Conley determined that gay *pro se* plaintiff Andrew Kummerow had fail to allege facts sufficient to ground an FHA discrimination and retaliation claim. *Kummerow v. OHAWCHA.org*, 2022 WL 873599, 2022 U.S. Dist. LEXIS 52985 (W.D. Wis., March 24, 2022). The defendant is the Oshokosh/Winnebago County Housing Authority, landlord of an apartment rented to Kummerow, who had numerous complaints about the condition of his accommodations. The only complaint that appears to relate in any way to his sexual orientation is that he received an agency letter that referred to him as "Francesca," which he found insulting, although the building manager "apologized for failing to 'change the name on the standard letter we use for the agency' and promised to send a corrected copy." A rather slender reed on which to sustain a sexual orientation discrimination claim, when there is no direct evidence that the landlord's agents knew that Kummerow was gay. Wrote Judge Conley, "plaintiff offers no allegations suggesting Fromm [the property manager] was even aware that he identified as LGBT before sending the offending letter, let along that plaintiff's sexual orientation was Fromm's motivation for violating his rights under the FHA. While a complaint need only give a defendant 'fair notice' of a claim and the grounds upon which it rests, a plaintiff's pleading obligation 'requires more than labels and conclusions.'" Having a cockroach infestation in one's apartment is obviously awful, but not in itself proof of bias against LGBT tenants. The court suggested that "complaints to HUD or the local housing authority about general conditions of an apartment or even mismanagement of the apartment complex are not considered related to unlawful discrimination." The court pointed out that when Kummerow complained to Fromm about getting a letter addressed to "Francesca," he is not alleging that he complained about discriminatory conduct at that time. "Although the court is sympathetic to the hardships plaintiff describes," wrote Judge Conley, "he cannot proceed on any of his federal claims of liability, at least as currently pleaded." However, the court noted that *pro se* plaintiffs are supposed to be given a chance to file amended complaints, once the dismissal opinion has explained how their complaint was lacking, so the court gave Kummerow 30 days to file an amended complaint. Judge Conley was appointed by President Barack Obama.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

ILLINOIS – Proceeding *pro se*, Thomas M. Leverette filed a post-conviction petition claiming ineffective representation of counsel. He was charged with four counts of aggravated criminal sexual abuse for having sex with a 14-year-old boy when Leverette was 26. Leverette and the boy's family were acquainted, although there was no evidence concerning how well Leverette knew the boy. He pled guilty after admitting to police that he engaged in the charged conduct. At the sentencing hearing, the presentencing report was discussed; it reported that Leverette had given a statement to investigators that he had met the boy through a gay dating App for which a person had to certify they were at least 18 to use the App. After he signed on to the App, he saw this boy listing himself as being 19. He claims he sent a message to the boy through the App, "I did not know you were gay," which received no response. He messaged the boy on Facebook and eventually they met and had sex. In his petition he doesn't disclaim having had sex with the boy, but does contend his counsel was ineffective in counseling him on pleading and that the state wrongfully suppressed this exculpatory evidence. He was sentenced to four years in prison. Judge Michael McCuskey of Stark County Circuit Court dismissed the postconviction petition, and in *People v. Leverette*, 2022 IL App (3d) 190639 (U) (March 30, 2022), the Illinois Appellate

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Court, 3rd District, affirmed. On appeal, he conceded that his claim that the State "inadvertently suppressed evidence" by not bringing to light his statement about the boy representing himself as 19 on the App was without merit, since "this evidence was within the defendant's control and was not used by the State." As to ineffective assistance, the court said that a prerequisite for such a claim was "either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." The court said this claim was forfeited because Leverette provided no evidence that the issue could not have been raised on a direct appeal from his conviction. "Additionally," said the court, "defendant's claims are so general that they lack a basis in fact. Defendant does not define or point to any specific deficiencies in counsel's representation but merely states that the conviction could have been challenged if not for counsel's deficient advice and strategy. Nor does defendant allege sufficient prejudice, that is, he would not have pled guilty but for counsel's deficient performance." The court deemed Leverette's petition to be "frivolous," noting that the presentencing report was discussed at the sentencing hearing and the actually issue raised then. Summary dismissal was granted by the unanimous three-judge panel. We see enough of these kinds of cases to caution that word should get out in the community; don't take as truth the ages people post on dating Apps, especially if they look very young! Sometimes they are very young, and sometimes they are youthful law enforcement officials trolling for trap "pedophiles."

PENNSYLVANIA – Andre Jamal Walker got into an argument with Kristopher Capron outside of a gay bar and ended up shooting him in his lower back and legs. When arrested, he possessed a gun for which he claimed to have a license, but which turned out to have been stolen. (He claimed he bought it on the street; obviously he had no receipt to prove this.) He was prosecuted and convicted by a jury on a charge of aggravated assault, and sentenced to 4-1/2 to 9 years in prison followed by 5 years of probation. In *Commonwealth v. Walker*, 2022 WL 909603, 2022 Pa. Super. Unpub. LEXIS 745 (Pa. Superior Ct., March 29, 2022), the appellate court rejected Walker's claim that the evidence was insufficient to support the verdict or that the trial court abused its discretion in sentencing. The story is a bit odd. The victim, Capron, decided to go out for a drink after working late and went to the only bar in the area that was open, only becoming aware that it was a gay bar after observing what was going on among the patrons, one of whom was Walker. Capron recognized Walker as somebody who lived in his neighborhood, initiated conversation and asked if Walker was gay, several times, never receiving a clear answer. At last call, Capron grabbed another drink and went out of the bar to smoke a cigarette, saw Walker, went over to him and again asked him if he was gay. When Walker seemed upset at the questioning, Capron asked if he wanted to engage in a fistfight with him. Walker drew his gun, fired a warning shot into the ground and then several shots at Capron's lower back and legs and left the scene. Capron described Walker to police, who quickly found and arrested him. Capron later told the police that he tried to buy marijuana from Walker and got into an argument about the amount he was supposed to receive, at which point Walker pulled the gun and shot Capron. The prosecutors overcharged Walker, but the jury rejected charges of attempted homicide and receiving stolen property and convicted only on aggravated assault. The trial judge's matter-of-fact summary of the facts, quoted verbatim by Superior Court Judge Mary Murray, leaves us to imagine why Walker got so upset at the persistent Capron. Is it customary for somebody in a gay bar to go up to another person and ask repeatedly whether they are gay, making a pest of themselves? Walker was provoked, but pulling a gun and shooting it when he could have just left the scene, as the court pointed out, undermined his claim that he was acting in self-defense. The Westlaw and Lexis reports of the case did not identify counsel at the time we saw them.

PRISONER LITIGATION NOTES

By William J. Rold

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

CALIFORNIA – *Pro se* transgender prisoner Brian Thomas Matheis sues corrections officer C. Godinez and others for Godinez' allegedly abusive strip search. Godinez came to interview Matheis about a complaint concerning missing property, during the course of which he demanded that Matheis vacate her cell to allow it to be thoroughly searched. According to the complaint, Godinez then ordered Matheis to strip completely for a personal search, after which he demanded that Matheis masturbate. He continues to insist after she protested, escalating to the point that he ordered her to put her little finger into the shaft of her penis, forcing her to continue the penetration more deeply after her fingernail caused bleeding. Apparently, there is some corroborating evidence, including a tier video, which, as usual, is under seal – and a sworn statement of the inmate in the next cell – which defendants say is perjured. Matheis complains of continuing pain, particularly on urination, and of mental distress. The opinion in *Matheis v. Godinez,* 2022 WL 782384 (S.D. Calif., Mar. 14, 2022), by U.S. Magistrate Judge Allison H. Goddard, deals only with an independent medical examination