FAYETTE DISTRICT COURT
CRIMINAL BRANCH
JURY TRIALS BRANCH
FOURTH DIVISION

COMMONWEALTH OF KENTUCKY

OCT 3 1986

PLAINTIFF

VS

OPINION AND ORDER

NO.86M859

JEFFREY WASSON

DEFENDANT

* * *

This matter is before the Court on the defendant's challenge to a statute under which he is indirectly charged. The defendant is actually charged with the offense of Criminal Solicitation, KRS 506.030. The crime he is accused of soliciting is Sodomy in the Fourth Degree, KRS 510.100. If the statute outlawing the conduct he allegedly solicited is invalid, then he cannot be convicted of an offense for soliciting that conduct. The defendant has offered no challenge to the solicitation statute, but challenges KRS 510.100, Sodomy in the Fourth Degree.

The defendant in this case is charged with soliciting a person of his same sex to engage in homosexual activity. KRS 510.100 essentially prohibits this conduct by outlawing "deviate sexual intercourse" between persons of the same sex. "Deviate sexual intercourse" is defined as "any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another." KRS 510.101 (1).

The defendant argues that KRS 510.100 violates his right to privacy as guaranteed by the Kentucky Constitution, his right to equal protection of the law under the United States and Kentucky

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constitutions, and the prohibition against cruel and unusual punishment contained in the United States and Kentucky Constitutions.

The Commonwealth contends that the statute passes muster under both Constitutions. Both the defendant and the Commonwealth have submitted briefs which clearly and forcefully set out their positions.

The United States Supreme Court recently addressed a somewhat similar state statute in the case of Bowers v. Hardwick, No. 85-140, slip op. The Bowers case clearly holds that the statute under atack here does not violate the right to privacy guarantee of the United States Constitution. Judicial construction of the federal Constitution in no way limits the rights and protections of the state constitution. The authorities cited by the defendant indicate that the right to privacy under the Kentucky Constitution is broader than that provided by the federal Constitution. Commonwealth v. Campbell, 117 S.W. 383 (1909), Commonwealth v. Vincent, 137 S.W. 2d 1091 (1940) Lewis v. Commonwealth, 247 S.W. 749 (1923), Commonwealth v. Smith, 173 S.W. 340 (1915), Hershberg v. City of Barbourville, 133 S.W. (1911).

This Court is of the Opinion that, based upon these authorities, the conduct prohibited by KRS 510.100 is protected by Section 1 of the Kentucky Constitution. The Commonwealth points out that the defendant's conduct herein took place in a public place and therefore is not private conduct. The statute under challenge here does not restrict itself to the regulation of public conduct and the Court expresses no Opinion as the Constitutionality of such a statute. If this statute is intended to prohibit only public solicitation then it is overbroad in the extreme. KRS 510.100 clearly

seeks to regulate the most profoundly private conduct and in so doing impermissably invades the privacy of the citizens of this state.

Having so found, the Court need not address the other issues raised by the parties.

For the reasons set out herein, the charge against the defendant is hereby Ordered Dismissed.

Dated this the 31 day of October, 1986.

JUDGE, FAYETTE DISTRICT COURT

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