

FILED

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

2016 MAY 13 PM 4:06

STATE OF WEST VIRGINIA,

Plaintiff,

J.E. HOOD
CIRCUIT CLERK
CABELL CO. WV

v.

**INDICTMENT No.:15-F-242
JUDGE PAUL T. FARRELL**

STEWART BUTLER,

Defendant.

**ORDER REGARDING APPLICABILITY OF WEST VIRGINIA CODE §61-6-21
AND SETTING TRIAL DATE**

Now comes this Court on consideration of the issue of whether the provision of West Virginia Code § 61-6-21 embodies a protection of an individual's civil rights if the violative act is based solely upon said individual's sexual orientation. That question was submitted to the Supreme Court of Appeals of West Virginia on December 14, 2015 pursuant to the Uniform Certification of Questions of Law Act, West Virginia Code § 51-1A-1 to 13. The Supreme Court denied certification on that question. Subsequently, the parties were ordered to brief the issue in support of their respective positions. Upon consideration of those briefs, the Court makes the following findings of fact and conclusions of law:

It is alleged that on or about April 5, 2015 Stewart Butler was in a vehicle and observed two males engage in a kiss on Fifth Avenue in Huntington, West Virginia. It is further alleged that Mr. Butler exited his vehicle, approached the men, made a homophobic slur, and then struck the alleged victims. A Cabell County Grand Jury indicted Mr. Butler on two (2) counts of Battery (Counts II and IV) and two (2) counts of

Prohibiting Violations of an Individual's Civil Rights in violation of West Virginia Code §61-6-21(b) (Counts I and III).

West Virginia Code § 61-6-21(b) (2015)(*emphasis added*) provides:

If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or **sex**, he or she shall be guilty of a felony, and, upon conviction, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

The Constitutionality of West Virginia Code §61-6-21(b) has been challenged. See *State v. Sulick*, 753 S.E.2d 875 (2012). In that case, a Caucasian criminal defendant challenged the constitutionality of § 61-6-21(b) following her conviction on three counts of criminal civil rights violations pursuant to that section of code for "name-calling, harassment, and other bad behavior" against neighbors that were African-Americans. *Id* at 878. Specifically, she argued that the section of code was "void for vagueness..." *Id* at 880. The Supreme Court disagreed and held that the statute is neither vague nor unconstitutional. *Id* at Syl. pt. 7. Accordingly, though not the same facts, the statute at issue has been reviewed and upheld by the Supreme Court within the last four years.

In the *Sulick* case, the Supreme Court reiterated that the primary object in construing a statute is to ascertain and give effect to the intent of the legislature. Syl. Pt. 5, 753 S.E.2d 875; see also Syl. Pt. 1, *Smith v. State Workmen's Compensation Commissioner*, 219 S.E.2d 361 (1975). And the parties agree that when a Court examines statutory language, words are generally given their common usage. "[C]ourts are not free to read into the language what is not there, but rather should apply the statute as written." *State ex rel. Frazier v. Meadows*, 454 S.E.2d 65, 69 (1994).

However, the State of West Virginia argues that this Court should “disregard the construction of the statute that omits any mention of protection for sexual orientation, because such a literal construction, though apparently warranted by the literal sense of the words in the statute, would clearly lead to injustice and absurdity.” *See State’s memorandum of Law of the Certified Question on West Virginia Code 61-6-21* at p. 14 (*internal citations omitted*). Though this Court does not disagree that a second penalty of hate crime charges on top of the existing battery charges may be *more* just if the alleged facts are true, this Court does not find this to be an “exceptional circumstance” warranting it to venture beyond the plain meaning of the statute because (1) there is an existing cause of action to punish the alleged behavior (the pending charges of battery), (2) the Supreme Court has reviewed this statute and held that it is not vague or unconstitutional, and (3) the result is not an “absurdity” in light of the legislature’s careful crafting of the statute at issue coupled with its repeated opportunities to amend it to include sexual orientation protection if it so desired.

Black’s Law Dictionary (10th ed., 2014) defines “sex” as “[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender.” Black’s Law Dictionary (10th ed., 2014) defines “sexual orientation” as “[a] person’s predisposition or inclination toward sexual activity or behavior with other males or females; heterosexuality, homosexuality, or bisexuality.”

“A statute is open to construction where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Sizemore v. State Farm Gen. Ins. Co.*, 505 S.E.2d 654, 659 (1998) (*citing Hereford v. Meek*, 386 S.E.2d 740 (1949)). Despite the

State's arguments relating to interpretation of the word "sex" within the context of Federal Title VII actions, this Court cannot reasonably hold that West Virginia Code § 61-6-21(b) is ambiguous or doubtful.

Many jurisdictions in the United States have enacted so called "hate crime" statutes. West Virginia's statute lists only protection for discrimination against sex. However, many jurisdictions include protection for discrimination against sex and sexual orientation while many other jurisdictions only protect for discrimination against sexual orientation. Based on a review of other jurisdictions' laws, it is plain that there are two distinct categories of potential discrimination: discrimination based on sex and discrimination based on sexual orientation.

As examples, the following jurisdictions have enacted legislation which protect either sex/gender and sexual orientation or sexual orientation alone: California ("Hate crime" means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: (2) Gender...(6) Sexual orientation..." *Cal. Penal Code § 422.55*); Colorado ("...unlawful acts against persons...because of...sexual orientation for the purpose of inciting and provoking bodily injury...should be subject to criminal sanctions." *C.R.S.A. § 18-9-121*); Delaware (Any person who "[s]elects the victim because of the victim's...sexual orientation, gender identity... "sexual orientation" means heterosexuality, bisexuality, or homosexuality, and the term "gender identity" means a gender-related identity, appearance, expression or behavior of a person regardless of the person's assigned sex at birth." *Del. C. § Sec. 1304*); Florida (...commission of such felony or misdemeanor evidences prejudice based on...sexual orientation.... *Fla. Stat. Ann. § 775.085; updated at 2016 Fla. Sess. Law. Serv. Ch. 2016-81 (H.B. 387)*); Hawaii (A "hate crime offender" is a defendant who

“intentionally selected a victim...because of hostility toward the actual or perceived...gender identity or expression, or sexual orientation of any person. *Haw. Rev. Stat. Ann. §706-662*); Illinois (“A person commits hate crime when, by reason of the actual or perceived...gender, sexual orientation... of another individual...commits assault, battery...” *720 Ill. Comp. Stat. Ann. 5/12-7.1*); Louisiana (“It shall be unlawful for any person, to select the victim...because of actual or perceived...gender...sexual orientation... *La. Stat. Ann. § 14:107.2*); Maryland (“Because of another’s...sexual orientation, gender...a person may not: (1)(i) commit a crime or attempt to commit a crime against that person;” *Md. Code Ann., Crim. Law § 10-304*). While the list of jurisdictions that have enacted protections against discrimination of sexual orientation could continue, the fact remains that West Virginia is not among them.

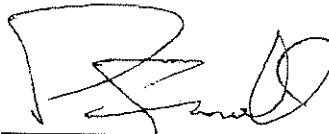
In enacting West Virginia Code § 61-6-21(b), the West Virginia legislature could have included sexual orientation as an area of protection; alternately, the legislature could have amended the law to include protection based on sexual orientation during any of its sessions. Numerous other states have done so. However, the West Virginia legislature has chosen not to include sexual orientation in the protected categories enumerated in West Virginia Code § 61-6-21(b). Likewise, the Supreme Court of Appeals of West Virginia has declined to consider this specific issue as of this time. Accordingly, this Court is bound to apply the law as it stands.

As such, this Court cannot expand the word “sex” to include “sexual orientation” within West Virginia Code § 61-6-21(b). Therefore, Counts II and IV of Battery contained in Indictment Number 15-F-242 shall remain, but the Counts I and III of Prohibiting Violations of an Individual’s Civil Rights in violation of West Virginia Code §61-6-21(b) contained in that Indictment shall be dismissed as the State of West Virginia

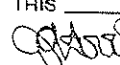
cannot properly bring such action against Mr. Butler under the laws of this State as they currently stand. However, the dismissal of those counts shall be delayed for sixty (60) days from entry of this Order so that the State may appeal this final order if it so desires.

WHEREFORE this Court finds that West Virginia Code § 61-6-21(b) does not provide protection of an individual's civil rights where the violative act is based solely upon said individual's sexual orientation and therefore ORDERS that Counts I and III of Indictment Number 15-F-242 are hereby dismissed. However, this Court ORDERS that such dismissal be delayed for sixty (60) days to allow the State of West Virginia sufficient time to appeal this decision to the Supreme Court of Appeals of West Virginia if it so desires. This Court further ORDERS that this case is set for trial on August 16, 2016 at 9:00 a.m.

Entered this 13th day of May, 2016.



Judge Paul T. Farrell
Sixth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON MAY 13 2016
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS MAY 13 2016
 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA