United States Court of Appeals
Fifth Circuit
F I L E D
June 21, 2004
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50213

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELIZABETH HERNANDEZ-SARMIENTO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. P-02-CR-125-ALL

Before JOLLY, DAVIS and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

The court has carefully considered the appeal filed by Hernandez challenging the denial of her motion to suppress evidence. Although Appellant's position is well argued, the determination whether Game Warden Cervantez had reasonable suspicion to stop her car because of its unusual night-time activity on Highway 349 is in this case heavily dependent on the district court's credibility determination. Both the district court and the magistrate judge found Warden Cervantez's explanation

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

of the basis for his suspicion credible, notwithstanding Appellant's counter-arguments. The court's factfindings are entitled to deference under the clearly erroneous standard. Further, his articulated facts, taken together, satisfied a standard of reasonable suspicion that Hernandez's vehicle might be engaged in illegal hunting. See United States of America v. Arvizu, 534 U.S. 266 (2002).

Accordingly, the motion to suppress was correctly denied, and the conviction is **AFFIRMED**.

EMILIO M. GARZA, Circuit Judge, dissenting:

I conclude that the Missouri sexual assault statute, which punishes a person for having "sexual intercourse with another person knowing that he does so without that person's consent," MO. ANN. STAT. § 566.040(1) (West 1999), is a crime of violence under U.S.S.G. § 2L1.2 cmt. n.1(B)(ii) (2002), because it has as an element the use of force. I accept, for purposes of this opinion, the majority opinion's rule, based upon the rationale in *United States v. Houston*, 364 F.3d 243 (5th Cir. 2004), that "intercourse does not involve the use of force when it is accompanied by consent-in-fact." However, I do not accept the majority opinion's holding that the Missouri sexual assault statute does not require the use of force.

The majority opinion's holding is based upon its conclusion that a defendant can be convicted under the Missouri sexual assault statute in cases where the victim gave consent-in-fact. This conclusion, based on *Houston*, necessarily assumes that a victim under the Missouri sexual assault statute can give consent-in-fact. *Houston* turned on the fact that an underage victim of statutory rape was capable of giving consent-in-fact to the sexual intercourse. In contrast, as explained below, a victim under the Missouri sexual assault statute is, by definition and as a matter of law, unable to give consent-in-fact to sexual intercourse. *See* MO. ANN. STAT. § 556.061(5) (West 1999). Therefore, sexual assault

under the Missouri statute involves the use of force and is a crime of violence.

Houston holds that a statutory rape victim can give consent-in-fact to sexual intercourse even though the victim cannot give legal consent, and, as a result, that statutory rape is not a crime of violence. *See Houston*, 364 F.3d at 247. *Houston* distinguished between legal consent and consent-in-fact based upon the assumption that the victim was able to consciously decide whether or not to engage in sexual intercourse with the defendant, and that the intercourse would be consensual were it not for her age. *See id*. at 247-48. That is, consent-in-fact only accompanies sexual intercourse in those situations where the parties were able to decide for themselves whether or not they wished to participate.

However, under the Missouri sexual assault statute a victim cannot give consent-in-fact because, by definition, the victim is unable to decide whether to participate in the sexual intercourse. In Missouri assent to sexual intercourse is not legal consent in situations where the defendant knew (or it was manifest) that the victim "lacked the mental capacity to authorize" the sexual intercourse or because of certain specified impairments was "unable to make a reasonable judgment as to the nature or harmfulness of" the sexual activity. MO. ANN. STAT. § 556.061(5) (a), (b) (West 1999).

Under the Missouri statutory definition of consent, even though the victim may have demonstrated some physical assent to the sexual intercourse, the victim was "unable to make a reasonable judgment" or "lacked the mental capacity" to do so and thus did not make the mental decision to engage in intercourse.[**] *Id.* Furthermore, Missouri's definition of consent requires that the defendant either knew of the impairment in the victim's cognitive ability or that the condition was "manifest." *Id*. If a person is convicted under Missouri's sexual assault statute, the victim was unable to give consent-in-fact and the defendant knew so.[***] Such a conviction involves a use of force. Therefore, I believe that a Missouri sexual assault conviction is a crime of violence for purposes of the 16-level enhancement under § 2L1.2.

I respectfully dissent.

[**] For example, in normal circumstances a twenty-five year old woman is able to consent to sex. However, under Missouri law, if she is "unable to make a reasonable judgment" due to intoxication, for example, she is unable to consent-in-fact to sexual intercourse.

[***] The Missouri definition of consent also provides that assent does not constitute legal consent when "[i]t is induced by force, duress or deception." MO. ANN. STAT. § 556.061(5)(c) (West 1999). Even assent procured by means of deception is not consent-in-fact because the defendant deprives the victim of the opportunity to make a mental decision whether or not to participate in the sexual intercourse. The victim is equally unable to give consent-in-fact whether such incapacity is caused by intoxication, mental retardation, or deception.