

Court within its rights in ruling on mandatory sentencing

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In 2005, during a public meeting attended by dozens of people, a 22 year old female employee of the Hillsboro Boy & Girl Club was observed leaning the back of the head of a 13 year old boy against her breasts for about one minute. The woman had been working closely with the youth and his family for over a year.

Under Oregon law, a person is guilty of sexual abuse in the first degree if he or she “cause[es a] person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.” If the victim is under 14 years old, the crime is sexual abuse in the first degree. The woman was prosecuted under this statute, and a jury decided that the touching of the head with the breasts was done for sexual gratification and convicted her.

Until 1991, the maximum penalty for this crime was 12 months in jail. This was then changed to a 16-18 month sentence for first time offenders. Then, in 1994, Oregon voters adopted Measure 11, which made the mandatory prison sentence 75 months (6 years and 3 months).

Last week, in a 4-3 decision, the Oregon Supreme Court reversed the woman’s sentence, and the identical sentence of a similarly-situated man, after finding the sentences to be unconstitutional. Article 1 Section 16 of the Oregon constitution requires that “all penalties shall be proportioned to the offense,” and the Supreme Court found that 75 months in prison were disproportionate to the conduct charged. Instead, the Court sentenced the woman to 1 year and 4 months.

The Supreme Court noted that the sexual abuse statute is so broadly worded that it treats identically the conduct of the defendant in the case, and the conduct of a man who was convicted for “stripping a six-year-old girl, laying her on the kitchen floor, and rubb[ing] his penis all over her.” The Court also noted that other, far more invasive, sexual crimes carry radically different, and much lighter, prison terms. For example, a first-time offender who, without consent, penetrated the anus or vagina of an 18 year old victim with his fingers, would only receive a sentence of 90 days in jail plus 90 days of custodial supervision. Finally, the Court considered the fact that the defendant had no previous criminal history. In fact, a lower court judge described the woman as having lead “an exemplary life.”

Three of the seven justices filed a dissenting opinion expressing the view that the 6 years and 3 months sentence was perfectly constitutional. What was most troubling about that dissent was its overly-simplistic constitutional analysis. The only relevant question for determining proportionality under the Oregon Constitution, said the dissenting justices, was whether it was “reasonable to conclude” that the penalized conduct (here, making the contact between the head and the breasts) justified the allotted punishment. In the dissenters’ opinion, it was “reasonable to conclude” that. Courts, they added, should never consult the sentences given to other crimes, or consider whether the defendant is a

hardened recidivist or a first-time offender, when they decide whether a sentence is constitutionally proportionate.

And why is that? Because, said the dissenters, such considerations “encroach on the authority of the legislature to determine the appropriate penalties...” Moreover, if such considerations are involved, they added, this may lead to “inconsistent results.”

Calls for a more deferential and a less assertive judiciary are, unfortunately, only too common these days. They are purportedly done in the name of “democracy,” but they forget that *our* democracy contains constitutional protections that place strict limitations on the powers of legislatures and voting majorities. They also forget that some of these protections employ complex concepts – like proportionality, or equality, or due process – that cannot be readily reduced to one simple question.

As for the dissenters’ concerns over “inconsistent results,” such concerns clearly favor the majority rather than the dissent: after all, giving the very same sentence to a habitual child molester and to a first-time offender does not sound very “consistent,” nor is it “consistent” to give a 90 day sentence to a man who, without consent, penetrated a woman’s vagina, and a 6 year sentence to a woman who leaned a teenager’s head against her breasts.

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