

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL SAMUEL BONO,

Defendant-Appellee.

UNPUBLISHED

June 12, 2001

No. 227278

Oakland Circuit Court

LC No. 99-169631-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DOUGLAS LAKE,

Defendant-Appellee.

No. 227280

Oakland Circuit Court

No. 99-169629-FH

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In these consolidated appeals, the prosecutor appeals as of right the order in each case dismissing the charge of gross indecency between males, MCL 750.338; MSA 28.570. We affirm.

On November 19, 1999, Mark Bowering, a Meijer store detective, entered the restroom at Meijer and noticed that both of the two adjoining stalls were occupied. Bowering washed his hands, walked out of the restroom, and waited in the front center lobby of the store for approximately eight to ten minutes. When nobody exited the restroom during that time, Bowering contacted his supervisor, Brian Reaver. Reaver and Bowering entered the restroom, and Bowering kneeled down and lowered his head to within one or two inches of the floor so that he could see under the stall doors. Bowering observed that the occupant of the handicapped stall, defendant Bono, was down on his knees, facing the adjacent stall, with his pants and underwear around his ankles. The occupant of the adjacent stall, defendant Lake, was sitting on the toilet.

Defendant Lake was “moving his arm up and down near the bottom of the handicapped stall” where defendant Bono was kneeling. Bowering did not actually see defendants touching each other and did not see either defendant’s penis.

Both defendants were charged with gross indecency between males and bound over for trial. Defendant Lake moved to quash the charge against him, and defendant Bono moved to dismiss the charge against him.¹ Following a hearing on the motions, the trial court granted the motions, concluding that (1) there was neither evidence that there was an entry of one defendant’s penis, finger, or tongue into the other defendant’s anus or mouth, nor evidence of the touching of one defendant’s tongue or mouth to the other defendant’s anus or genital organs, and (2) defendants had a reasonable expectation of privacy in the stall.

A lower court’s ruling regarding whether alleged conduct falls within the scope of a criminal statute is a question of law that appellate courts review de novo for error. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991). The gross indecency statute, MCL 750.338; MSA 28.570, provides, in pertinent part, that any “male person who, in public or in private, commits or is a party to the commission of . . . any act of gross indecency with another male person shall be guilty of a felony.” Assuming, without deciding, that *consensual* masturbation among *consenting adults in private*² is not an act of gross indecency,³ the prosecution must establish in this case that, for purposes of the statute, defendants committed an act of gross indecency “in public.”

In *People v Brown (After Remand)*, 222 Mich App 586, 591; 564 NW2d 919 (1997), this Court defined “public place”:

The key issue in deciding whether a sexual act was conducted in a “public place” is not so much the exact location of the act, but whether there is the possibility that the unsuspecting public could be exposed to or view the act.⁴

The prosecutor cites *People v Kalchik*, 160 Mich App 40; 407 NW2d 627 (1987) in support of the contention that a restroom stall is a public place. In *Kalchik*, the defendant engaged in homosexual activity with another male in restroom stalls in a shopping mall. The activity of the two men was monitored and videotaped by a video camera placed in the ceiling of the restroom pursuant to two search warrants. Defendant was filmed performing fellatio on the

¹ Defendant Bono waived his right to a preliminary examination, so the trial court considered defendant Bono’s motion to quash to be a motion to dismiss.

² See *People v Williams*, 237 Mich App 413, 415; 603 NW2d 300 (1999), vacated on other grounds 462 Mich 861 (2000).

³ The prosecutor has never suggested that consensual sexual acts among adults in private are acts of gross indecency that are prohibited under the statute.

⁴ The standard jury instruction for gross indecency reflects the holding in *Brown*, and instructs the jury that “a place is public when a member of the public, who is in a place the public is generally invited or allowed to be, could have been exposed to or viewed the act.” CJI2d 20.31.

other male after which the second male masturbated the defendant. All the activity took place below the partition dividing two of the bathroom stalls. *Id.* at 43. In finding that the activity took place in public, the Court stated that:

the activity took place below the partitions separating the restroom stalls and, therefore, could be observed by one in the common area of the restroom by looking under the doors which were approximately fourteen inches off the floor. Hence, the activity took place in public. . . [*Id.* at 47.]⁵

In *Brown*, the Court noted that the circumstances of each particular case control the determination whether a sexual act was conducted in a public place. *Id.* at 593. In the present case, defendants were in adjacent stalls, with the doors closed. It is undisputed that the store detective did not observe any activity below the door or partition, and no evidence has been presented that would support a finding that the unsuspecting public could have been exposed to or viewed the act from the common area of the restroom. Indeed, the store detective had to get on his knees and lower his head to within one or two inches from the floor to attempt to see what was occurring in the stall. Thus, on the facts before us, we conclude as a matter of law that defendants' conduct did not occur in a "public place" within the meaning of § 338.⁶

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

⁵ Contrary to the prosecutor's contention, whether or not defendant had a reasonable expectation of privacy is not relevant to whether defendant's acts occurred in a public place. The discussion in *Kalchik* regarding a "reasonable expectation of privacy" was with regard to whether the videotape evidence should have been suppressed as the result of an unreasonable search.

⁶ Given our resolution of this issue, we need not address the remainder of the issues raised by defendants.