

FILED IN OFFICE

AUG 19 2005

IN THE COURT OF APPEALS

CLERK COURT OF APPEALS OF GA

STATE OF GEORGIA

STATE OF GEORGIA,

APPELLANT,

vs .

CASE NO.: A05A2123

L.A.N.,

APPELLEE

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BRIEF FOR THE APPELLEE

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PART ONE, BRIEF FOR APPELLEE

ISSUES AND STATEMENT OF FACTS

The issues to be determined by this Honorable court are:

(1) Whether or not the Trial Court erred in granting Appellee's General Demurrer and dismissing the Fornication charge against Appellee.

Statement of Facts

This is a case whereby Appellee was arrested and charged with the offense of Fornication which allegedly occurred in December 2004.

Appellee's Trial Counsel filed a General Demurrer to said charge on March 28, 2005, stating that the Petition against

Appellee failed to charge Appellee with any offense against the laws of the State of Georgia, and that the Fornication was unconstitutional and had already been held to be unconstitutional.

The Trial Court granted Appellee's Demurrer and dismissed the Petition on April 28, 2005.

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ARGUMENT AND CITATIONS

I.

THE TRIAL COURT RULED CORRECTLY IN GRANTING APPELLEE'S  
DEMURRER AND IN DISMISSING THE PETITION AGAINST APPELLEE.

Appellant's arguments are without merit. First, Appellant argues that a Demurrer does not comport with the procedural demands of bringing a constitutional challenge. What Appellant fails to realize is that Paragraph 1 of Appellee's Demurrer states that Appellant's Petition failed to charge Appellee with any offense against the laws of the State of Georgia, and Paragraph 3 states that the Fornication statute is unconstitutional as said statute

has already been held to be unconstitutional. Thus, Appellee does not bring a constitutional challenge to the Fornication Statute, but simply states that the offense charged against Appellee does not violate any laws of the State of Georgia, and that the Fornication Statute has already been held unconstitutional.

Secondly, Appellant argues that the trial Court was wrong in granting Appellee's Demurrer and dismissing the Delinquency Petition because Appellee's conduct is not protected by the fundamental right to privacy. Further, all of the cases cited by Appellant pre-dates the case in which the Fornication Statute was declared unconstitutional.

Georgia's Fornication Statute, O.C.G.A. § 16-6-18, provides that, "[A]n unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person and, upon conviction thereof, shall be punished as for a misdemeanor."

The Supreme Court of Georgia, in the case of *In re: J.M.*, 276 Ga. 88, 575 S.E. 2d 441 (2003), declared Georgia's Fornication Statute unconstitutional as the State had no compelling interest in criminalizing consensual sexual acts of two persons legally capable of consenting to those acts.

The State's logic in attempting to distinguish between the

facts of In re: J.M and this present case is flawed as the Supreme Court did not rule that the Fornication Statute as written was applicable only in situations involving unmarried minors under the age of sixteen (16). The Supreme Court ruled that the Fornication Statute was unconstitutional, and said Court is not in the business of re-writing statutes.

This Court, based upon the ruling in the case of In re: J.M, declared and ruled that fornication is no longer illegal in the State of Georgia as there is no law against it. Abrams vs. Massell, 262 Ga. App. 761, 586 S.E. 2d 435 (2003).


Appellant fails to recognize that once a statute has been declared unconstitutional, the statute remains unconstitutional until the State Legislature, not the District Attorney's Office, re-write the statute in question.

Thus, the Trial Court was correct in granting Appellee's Demurrer and dismissing the Petition against Appellee as the State did not charge Ms. Nally with any offense against the laws of the State of Georgia because the Fornication Statute had previously been declared unconstitutional.

CONCLUSION

For the reasons enumerated hereinabove, the Court should  
**AFFIRM** the Trial Court's ruling.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert L. Mack, Jr.", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

This is to certify that I have served the foregoing Response to the State's Appeal upon all parties by placing a true copy of same in the U.S. mail, with adequate postage affixed thereto, and addressed to:

Henry County District Attorney  
Henry County Courthouse  
One Courthouse Square  
McDonough, GA 30253

This the 10<sup>th</sup> day of August, 2005.



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