SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA	:	
	:	**2014 CMD 18262**
v.	:	**Senior Judge Geoffrey M. Alprin**
	:	
BERNARD FREUNDEL	:	

ORDER DENYING DEFENDANT'S
MOTION TO CORRECT AN ILLEGAL SENTENCE

On July 31, 2015, the court heard oral argument on the defendant's Motion to Correct an Illegal Sentence, filed May 29, 2015, and the government's response, filed July 2, 2015. The court denied the motion at the conclusion of the hearing. This order is issued to provide the court's reasoning in reaching the decision to deny the motion.

I. Background

On February 19, 2015, defendant Bernard Freundel pled guilty to 52 counts of voyeurism pursuant to D.C. Code § 22-3531(b) and (c). At the hearing, the defendant acknowledged that he could receive a maximum sentence of incarceration of 52 years based on the 52 individual counts. The defendant also agreed to the following facts, *inter alia*, set forth in the Factual Proffer in Support of Guilty Plea:

> "Computer forensic examinations of all of the electronic devices and digital media storage devices seized from defendant's home and office revealed recordings made by the defendant of at least 52 women who were totally or partially undressed in the large showering/changing room of the National Capital Mikvah between February 19, 2012 and September 19, 2014, each of whom was recorded undressing separately . . . None of the 52 women had knowledge of, or consented to, being recorded by the defendant. . . . Each of the recordings the defendant made depicts the recorded women totally or partially undressed before and/or after taking a shower. The defendant periodically installed and removed the recording device. The defendant saved each digital recording separately and named each file by using the recorded woman's names or initials."

Plea Agreement 8.

On May 15, 2015, the defendant was sentenced to 45 days of incarceration on each count, to run consecutively, totaling approximately six-and-a-half years. In addition, the court ordered the victim to pay $250 for each count under the Victims of Violent Crime Compensation Act.

On May 29, 2015, the defendant filed a Motion to Correct an Illegal Sentence pursuant to Super. Ct. Crim R. 35(a), arguing that the six-and-a-half year sentence was in violation of the Double Jeopardy Clause of the Fifth Amendment. On June 17, 2014, the court ordered the government to respond by July 1, 2015. The government subsequently filed its response on July 2, 2015.

The defendant argues that D.C. Code § 22-3531 (b) and (c) is ambiguous as to whether the unit of prosecution is based on each victim or on the defendant's conduct. Because the statute appears ambiguous to the defendant, he argues the Rule of Lenity should be applied, thus setting the unit of prosecution at each course of conduct. The defendant argues that the court should then apply the impulse test to the factual record to determine the number of separate courses of conduct, which would cause the court to determine that less than 52 courses of conduct had occurred. This contention was not raised at the plea hearing on February 19, 2015, but it was raised orally at the sentencing proceeding on May 15, 2015.

In response to the defendant's motion, the government argues that the voyeurism statute is unambiguous and clearly defines the unit of prosecution as each individual victim. The government argues that crimes against separate victims generally do not merge and that, here, each count requires a different proof of facts. The government therefore contends that the court does not need to apply the Rule of Lenity and the impulse test.

II. Analysis

Upon consideration of the merits of the defendant's motion, this court is not persuaded that the sentence imposed is illegal.

This court need not apply either the Rule of Lenity or the impulse test because it believes that D.C. Code § 22-3531 (b) and (c) unambiguously permits the prosecution to charge the defendant per victim. First, the issue before the court is a matter of statutory, not constitutional, interpretation. *Ladner v. United States*, 358 U.S. 169 (1958). In order to determine whether D.C. Code § 22-3531 (b) and (c) is ambiguous with regard to the unit of prosecution, an analysis of statutory application and legislative intent must be done. *See Hammond v. United States*, 77 A.3d 964, 967 (D.C. 2013); *Speaks v. United States*, 959 A.2d 712 (D.C. 2008). The relevant language of the statute is as follows:

> "(b) Except as provided in subsection (e) of the section, it is unlawful for any person to occupy a hidden observation post or to install or maintain a peephole, mirror, or any electronic device for the purpose of secretly or surreptitiously observing an individual who is:
>
> (1) Using a bathroom or rest room;
>
> (2) Totally or partially undressed or changing clothes; or
>
> (3) Engaging in sexual activity.
>
> (c)(1) Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is:
>
> (A) Using a bathroom or rest room;
>
> (B) Totally or partially undressed or changing clothes; or
>
> (C) Engaging in sexual activity
>
> (2) Express and informed consent is only required when the individual engaged in these activities has a reasonable expectation of privacy."

D.C. Code § 22-3531 (b) and (c).

A review of the plain language of the statute makes clear that the unit of prosecution is, and was intended by the District of Columbia Council to be, the victim. The statute explicitly references "individual" multiple times when describing to whom the prohibited conduct must be

directed. *Id.* § 3531 (b), (c)(1), (c)(2). Furthermore, section (b) requires that the unlawful observation "of an individual" be done "secretly or surreptitiously," and section (c)(2) requires that "the individual" have "a reasonable expectation of privacy" when express consent is required. *Id.* Both these provisions compel the conclusion that the specific individual's lack of knowledge or awareness of the defendant's actions is an essential element in what makes certain conduct voyeuristic. Therefore, the use of the singular term "individual" and the focus on the individual's knowledge strongly suggest that the victim is the unit of prosecution because the circumstances of each individual victim must be analyzed when applying the statute.

Moreover, the statute cannot be read to restrict the court to a sentencing limitation of, in effect, a single count involving a single victim, when there are, in fact, multiple victims, because the plain language requires an analysis of each individual victim's conduct and knowledge. This conclusion is bolstered by the fact that an individual's consent is a defense to a charge of voyeurism. *Id.* § 3531 (c)(2). Simply put, it would be illogical for the unit of prosecution to be the defendant's conduct as that would render the language regarding the individual's conduct, knowledge, and consent meaningless.

In addition to the unambiguous statutory language, there is also the general rule that separate counts do not merge when there are multiple victims and the "gravamen" of the offense is focused on protecting individual victims. *See Speaks*, 959 A.2d at 712 (D.C. 2008) (holding that three counts of cruelty to children were proper where defendant carjacked a car with three children inside because the "gravamen" of the cruelty to children statute is harm to the individual children); *see also Ruffin v. United States*, 642 A.2d 1288, 1298 (D.C. 1994) (holding that there may be as many offenses as victims even where a single assaultive act results in multiple victims); *Williams v. United States*, 569 A.2d 97, 104 (D.C. 1989) (holding that the number of

victims who die as a result of defendant's actions determines the counts for manslaughter, not the number of acts).

The defense relies on *Bell v. United States*, 349 U.S. 81 (1955), to argue that the "gravamen" of the voyeurism statute should be the defendant's conduct. In *Bell*, the defendant was charged with two counts of violating the Mann Act (interstate transportation for immoral purposes). *Id.* at 81. The U.S. Supreme Court held that the defendant should have been charged only once because the act of transportation was what Congress intended to be the unit of prosecution, not the number of women transported. *Id.* at 82-83. The government responds that *Bell* is dissimilar to the instant case because the Mann Act was designed to protect the community's moral standards, not individual victims.

Here, the voyeurism statute is distinguishable from the Mann Act because the gravamen of the offense is the violation of the privacy of the individuals illegally recorded. The voyeurism statute was enacted to protect an individual's privacy whereas the Mann Act was enacted to punish an immoral act. Therefore, *Bell* does not apply when a statute is designed to protect individual victims. Without a violation of privacy, there would be little concern about a defendant's observation or recording, and to hold otherwise would compromise the plain language and purpose of D.C. Code § 22-3531(b) and (c). Therefore, the "gravamen" of the voyeurism statute requires the unit of prosecution to be the number of victims.

III. Conclusion

This court concludes that D.C. Code § 22-3531(b) and (c) is not ambiguous with regard to the unit of prosecution. The plain language and "gravamen" of a voyeurism offense make clear that the unit of prosecution is each victim. Because there is no ambiguity, the court declines

to apply the Rule of Lenity and impulse test to the facts of this case. Therefore, the sentence this court imposed on the defendant for the 52 counts of voyeurism was not illegal.

Accordingly, it is hereby this 31 day of July, 2015,

ORDERED that the defendant's Motion to Correct Illegal Sentence is **DENIED.**

Senior Judge Geoffrey M Alprin.
/Signed in Chambers/

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