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IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

VYTAUTAS FINADAR)
BELIAJUS,)
)
Plaintiff in Error,))
)
vs.)
)
HOWARD K. PHILLIPS,)
MANAGER OF SAFETY AND))
EX-OFFICIO SHERIFF,)
CITY AND COUNTY OF)
DENVER, STATE OF)
COLORADO,)
)
Defendant in Error.)

Error to the
District Court
in and for the
City and County
of Denver
State of Colorado
FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

JAN 23 1969

Richard D. Turelli
HONORABLE CLERK
SAUL PINCHICK
Judge

ANSWER BRIEF OF DEFENDANT IN ERROR

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EX-OFFICIO SHERIFF,)	
CITY AND COUNTY OF)	
DENVER, STATE OF)	
COLORADO,)	HONORABLE
)	SAUL PINCHICK
Defendant in Error.)		Judge

ANSWER BRIEF OF DEFENDANT IN ERROR

SUPPLEMENTAL STATEMENT

Plaintiff in error will be referred to as the petitioner, and defendant in error will be referred to as the respondent.

Petitioner's statement of the case is accepted by the respondent as factual.

SUMMARY OF THE ARGUMENT

In charging the crime of common law sodomy it is not necessary to allege the particular elements of the offense or otherwise describe the manner in which it was committed.

ARGUMENT

THE OREGON INDICTMENT ALLEGING
THE PETITIONER COMMITTED "SODOMY"
IS SUFFICIENT TO SUSTAIN HIS
EXTRADITION.

In Arguments I and II of his brief to this Court, petitioner contends that the extradition papers fail substantially to charge him with having committed a crime under the laws of the State of Oregon, and that the District Court erred in dismissing his petition, discharging the writ of habeas corpus, and remanding him to custody for extradition. Petitioner's arguments may be combined for purposes of our answer.

In support of his contentions petitioner argues that an essential element of the crime of sodomy is penetration, which must be alleged in the indictment. Since the indictment in the instant case does not allege penetration, petitioner submits that the indictment is insufficient to sustain his extradition.

The Oregon Sodomy Statute, O.R.S. 167.040, provides:

"Sodomy: proof needed. (1) Any person who commits sodomy or the crime against nature, or any act or practice of sexual perversity, either with mankind or beast, or sustains osculatory relations with the private parts of any person, or permits such relations to be sustained with his private parts, shall be punished upon conviction by imprisonment in the penitentiary for not more than 15 years. (2) Proof of actual penetration into the body is sufficient to sustain an indictment for the crime against nature."

The indictment in the instant case states (f. 30 F):

"Vytautas Finadar Beliajus is accused by the Grand Jury of the County of Marion, and State of Oregon, by this indictment of the crime of Sodomy committed as follows: The said Vytaytas Finadar Beliajus on the 4th day of July, 1967, in the County of Marion, and State of Oregon, then and there being, did then and there unlawfully and feloniously and

against the order of nature, commit the crime of sodomy upon a certain human being, to-wit: Edward William Wonacott, of the age of fourteen (14) years, contrary to the Statutes in such cases, made and provided, and against the peace and dignity of the State of Oregon."

As interpreted by the highest court of the State of Oregon, O.R.S., 167.040, defines three separate offenses, the first of which is common law sodomy or the crime against nature. Being an offense known to the common law, further statutory definition is not necessary and the common law definition will be applied. State v. Anthony, 179 Or. 282, 169 P.2d 587.

At common law, sodomy is defined as unnatural carnal copulation whether with man or beast, and penetration per anus or per os is sufficient to constitute the offense. State v. Start, 65 Or. 178, 132 Pac. 512.

The nature of the evidence with respect to the actual commission of sodomy is the same as in the case of rape. State v. Anthony, supra. And, as in the offense of sodomy, the crime of rape is also defined as requiring carnal copulation or penetration. An indictment charging common law rape, however, need not set forth the

means or method employed in committing the offense. 75 C.J.S., Rape, §39, p. 503:

"Carnal knowledge or sexual intercourse denotes penetration; actual contact of the sexual organs of a man and a woman and actual penetration into the body of the latter. There can be no carnal knowledge without penetration. Sexual penetration of the female is a necessary element of the crime of rape;" 75 C.J.S. Rape, § 10 b p. 472. (emphasis supplied)

". . . (I)n charging the crime of sodomy, because of its vile and degrading nature there has been some laxity in the strict rules of pleading. It has never been the usual practice to describe the particular manner or the details of the commission of the act." 48 Am. Jur., Sodomy, § 4 p. 551.

"Because of the degrading nature of the crime of sodomy it is very generally held that it is not necessary to describe the offense with the same particularity that is required in charges of other crimes. Thus, an indictment for sodomy need not define the crime or charge with great particularity or certainty the separate

elements and particular averments of the elements or facts constituting the offense are generally unnecessary;" 81 C.J.S., Sodomy, § 4 b p. 373

In State v. Langelier, 136 Me. 320, 8 A.2d 897, the court said, citing Wharton's Criminal Procedure, 10th Ed., §§ 1234, 1243, that it is sufficient to charge merely that the accused committed "sodomy". The offense is too well known to require further definition, details or description.

The respondent submits that the indictment in the instant case substantially charges the petitioner with the crime of sodomy under the Oregon statute, O.R.S. 167.040. The first offense proscribed by the statute is common law sodomy, which is defined as unnatural carnal copulation with man or beast. As in the case of rape, an indictment charging the common law offense need not set forth the manner in which the offense was committed. The element of penetration is embraced within the term copulation; copulation denotes penetration.

In addition, because of the nature of the offense of sodomy, it has never been required that an indictment allege the specific elements of the offense or to describe the manner in which it was committed.

Therefore, while it may be necessary for the prosecution to prove the element of penetration at the trial of the case, it is not necessary to allege it in the indictment.

The authority presented by petitioner is not contrary. Buhler v. People, 151 Colo. 345, 377 P.2d 748, is distinguishable on its facts from the instant case. In that case the Illinois statute included intent to defraud in its definition of forgery. The defendant was charged only with signing another's name to a document which is no offense at all either at common law or under the Illinois statute. That reasoning is not applicable to the charge of sodomy here which is an offense under the laws of Oregon.

In Capra v. Ballarby, 158 Colo. 91, 405 P.2d 205, this Court emphasized that under CRS 1963, 60-1-3, and under Uniform Extradition Laws, the indictment must substantially charge a crime, thus recognizing that the word substantially was not used idly and with no intent that it be given meaning and effect:

"This court has stated that the provisions in the law regarding extradition should not be, 'so narrowly interpreted, as to enable offenders against the laws of a state to find a permanent asylum

in the territory of another state.'
Travis v. People, 135 Colo. 141,
 308 P.2d 997." 158 Colo. at 97.

CONCLUSION

Respondent submits that the indictment in the instant case substantially charges petitioner with the crime of sodomy under the laws of Oregon, and the judgment should be affirmed.

The Governor's warrant and supporting documents are prima facie evidence that the accused is substantially charged with a crime in the demanding state, Capra v. Miller, ___ Colo. ___, 422 P.2d 636, and petitioner here has not sustained his burden of establishing that he is not so charged.

Respectfully submitted,

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