

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000936-DG

VENUS STARLETT DUST MORGAN

APPELLANT

v. ON DISCRETIONARY REVIEW
FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS FOUST, JUDGE
ACTION NO. 98-XX-00003

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING
** **

BEFORE: COMBS, EMBERTON AND MILLER, JUDGES.

EMBERTON, JUDGE: Venus Starlett Dust Morgan attended the Tater Day Festival in Benton, Kentucky, where she purchased a t-shirt with the words "I am the God of Fuck" printed on the front of the t-shirt. The phrase is a lyric in a song by the controversial singer, Marilyn Manson.

Venus then conspicuously wore the shirt as she walked around the festival. Tater Day is a family oriented festival attended primarily by the people of Marshall and its surrounding counties. Many of those there for the occasion are children with

and without the presence of their parents. At least three parents who had seen the appellant's display of the shirt complained to a police officer regarding the offensive language on the shirt. After Venus refused to comply with the officer's request that she change shirts, she was charged with harassment pursuant to Kentucky Revised Statutes (KRS) 525.070(1)(e), which states:

(1) A person is guilty of harassment when with intent to harass, annoy or alarm another person he:

. . . .

(e) Engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Following her plea of not guilty the case was tried before the Marshall District Court without a jury. Prior to trial her motion to dismiss for failure to charge an offense was denied. At trial Venus argued that she had a constitutionally protected right under the First and Fourteenth Amendments to wear and display the t-shirt. The district court found her guilty of harassment and upon appeal the circuit court held that the display of the t-shirt was not constitutionally protected speech, and that the harassment statute does not require an intent to harass a specific person but can be directed at the general public.

Although the constitutional arguments raised by Venus are worthy of intellectual discussion, we elect not to do so since a determination of the constitutionality of KRS 525.070(1)(e) is not necessary to a resolution of this case. We

are convinced that Venus's act of wearing a t-shirt with admittedly offensive language was not within the intended conduct to be prohibited under the statute.

The statute requires that there be a course of conduct or repeated acts done with the intent to harass, annoy, or alarm another person. Arguably, when Venus appeared at Tater Day she likely intended to annoy festival goers. By wearing the t-shirt Venus knew she would be seen, and by her proclamation "I am the God of Fuck," it may well be inferred that she intended for viewers to be annoyed.

But, by the terms of the statute under which she was charged it is not sufficient simply for one to be offended, or to be simply annoyed, by the vulgar display. The statute requires more. The actor must engage in a course of conduct or repeatedly commit acts which alarm or seriously annoy another person. A single act that annoys another person simply is not harassment as defined by the statute. Wearing a t-shirt is not a course of conduct as required by the statute, nor was her conduct repeated. She wore the t-shirt at the festival on a relatively brief occasion before being whisked off by police.

KRS 525.070(1)(e) requires that the actor intend to harass, annoy, or alarm another person and that such other person must be alarmed or seriously annoyed. There is no evidence that Venus's actions alarmed or seriously annoyed any festival patron. In fact, the problem here is that the Commonwealth presented no evidence at all to the court. The Commonwealth and Venus's counsel stipulated that she wore the t-shirt with the intent to

be seen and that three mothers with children complained about the language on the t-shirt. There is not a scintilla of evidence offered upon which the court could find that the mothers, or their children, were "alarmed" or "seriously annoyed." The statute clearly requires more than a simple expression of dislike by the members of the public for the conduct of another person.

While most would agree that Venus's choice of attire at Tater Day was distasteful and inappropriate for any occasion, in absence of any testimony being offered in evidence as to serious annoyance, her conduct is simply not prohibited under KRS 525.070(1)(e). We agree with the commentary to the statute which explains its intent:

Under the Kentucky Penal Code, nothing constitutes an assault unless there is a physical injury which is defined as substantial physical pain or any impairment of physical condition. Thus, a mere physical touching does not fall within the assault provision unless the intent to inflict physical injury is proven, in which case the touching may constitute attempted assault in the third or higher degree. On the other hand, disorderly conduct requires an intent to cause public annoyance or alarm. KRS 525.070 seeks to fill these two gaps. It covers an area of minor assaultive conduct which formally constituted simple assault where the intent is to annoy or alarm a specific individual rather than the public. It should be noted, however, that the accused must act with the intent to harass, annoy or alarm another person.

There being no evidence that Venus intended to, or did, annoy a specific individual or individuals at the festival, we have no alternative but to hold that she did not engage in a course of conduct sufficient to constitute harassment.

The judgment is reversed.

ALL CONCUR.

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