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Court Tosses Convictions for Harassing Clinic Patrons

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The Alameda Superior Court Appellate Division has thrown out a minister's convictions for harassing patrons of an Oakland abortion clinic, citing instructional error.

In a decision published yesterday, the panel concluded that Walter Hoye had been prejudiced by Judge Stuart Hing's failure to define the word "approach," as used in Oakland's "bubble-zone" ordinance, as well as the absence of a unanimity instruction.

The ordinance criminalizes the non-consensual and "knowing approach" of a person seeking entry to a reproductive health care facility for the purpose of counseling or harassment.

Hoye was charged with several violations of the ordinance based on his actions of April 29 and May 3, 2009.

At trial, the prosecution presented evidence that Hoye had stood in front of the Family Planning Specialists building holding a sign which stated:

"Jesus loves you and your baby. Let us help."

He also allegedly had literature about abortion alternatives for distribution, and four witnesses described multiple interactions between Hoye and individuals entering the clinic.

Hoye insisted that these encounters did not violate the ordinance since he did not "approach" patients if he remained more than eight feet away or if patients passed by him on their way to the clinic while he was standing still. He further argued he had not knowingly come within eight feet of some other patients because he had not seen them while his back was turned or his line of sight was impeded.

A jury convicted Hoye of violating the ordinance on both days, but Judge Michael J. Gaffey, writing for the appellate panel, questioned whether the jury would have done so if it had been instructed with CALCRIM No. 3500.

"The purpose of the unanimity instruction is to prevent a verdict that results from some jurors believing the defendant committed one act and others believing the defendant committed a different act, without agreement on what conduct constituted the offense," Gaffey explained. Since the prosecution presented evidence of more than one act to prove violation of the Oakland ordinance and Hoye asserted different

defenses to each, Gaffey said, the trial court had a sua sponte duty to instruct the jury that it had to agree which of Hoye's acts were criminal.

Gaffey added that the term "knowingly approach" also has legal significance beyond its common understanding following the U.S. Supreme Court's 2000 decision in *Hill v. Colorado*, 530 U.S. 703, which upheld the constitutionality of a Colorado statute that similarly prohibited the "knowing[] approach" of a clinic patient.

In reaching its conclusion, the *Hill* court reasoned that a protester, while remaining stationary, could verbally address passersby and proffer leaflets without running afoul of the Colorado law.

Since the jury was not apprised such conduct did not constitute the approach of a patient, Gaffey opined, the jury did not have a correct understanding of what the Oakland ordinance prohibited.

"This alone, and certainly when considered in connection with the lack of unanimity instruction, leads us to conclude that the convictions must be reversed," he said.

Presiding Judge John True III and Judge Wynne S. Carvill joined Gaffey in his decision in *People v. Hoye*, JAD10-04.

Deputy District Attorney Scott Jackson represented the government on the appeal and admitted he was "disappointed" with the outcome.

"We don't think that the word 'approach' needs any legal definition," Jackson said. "We think the word is satisfactorily defined in the dictionary and its common everyday meaning."

Allison K. Aranda of the Life Legal Defense Foundation, one of the attorneys who represented Hoye, said she was "elated" and "relieved" by the decision, which she predicted would "make people feel confident they can go out there and engage in the type of conduct that Pastor Hoye engaged in, without fear of retribution."

Hoye issued a statement through the LLDF, remarking that he hoped the decision would encourage others "to both take a public stand against abortion in the pulpit and to minister the love of Christ to the men, women and children going into an abortion clinic from the public square."

Aranda added that Hoye is also challenging the constitutionality of the ordinance in an appeal before the Ninth Circuit U.S. Circuit Court of Appeals, and argument is set in that matter for Oct. 8.