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*** ARCHIVE ***

*** THIS SECTION IS CURRENT THROUGH THE 2005 SESSION ***

PENAL LAW
PART THREE. SPECIFIC OFFENSES
TITLE M. OFFENSES AGAINST PUBLIC HEALTH AND MORALS
ARTICLE 230. PROSTITUTION OFFENSES

NY CLS Penal § 230.03 (2005)

§ 230.03. Patronizing a prostitute in the fourth degree

A person is guilty of patronizing a prostitute in the fourth degree when he patronizes a prostitute.

Patronizing a prostitute in the fourth degree is a class B misdemeanor.

HISTORY: Add, L 1978, ch 627, § 2, eff Sept 1, 1978.

NOTES:

Research References & Practice Aids:

35B NY Jur 2d, Criminal Law § 4929

43 NY Jur 2d, Declaratory Judgments and Agreed Case § 49

60 NY Jur 2d, Forfeitures and Penalties § 102

Annotations:

Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignation-modern cases.77 ALR3d 519

Texts:

New York Criminal Practice Ch. 77

Criminal Jury Instructions, New York:

Patronizing a prostitute, fourth degree. CJI2d [NY] *Penal Law* § 230.03

Case Notes:

In trial for fourth degree patronizing prostitute, defendant was not entitled to jury charge on affirmative defense of entrapment based on his testimony that man dressed as woman approached his car, offering to perform oral sodomy for money, and that he did not respond to offer, since (1) defendant's testimony denying that he committed proscribed conduct did not by itself support requested charge, and (2) undercover officers' testimony that they merely afforded defendant opportunity to commit offense was insufficient to warrant entrapment charge. *People v Brown* (1993) 82 NY2d 869, 609 NYS2d 164, 631 NE2d 106.

In trial for prostitution and promoting prostitution, defendant was not entitled to jury instruction on defense of entrapment since record showed that police did not actively induce or encourage defendant but merely offered her opportunity to commit offense by posing as business executives having party at motel and agreeing to pay defendant \$ 450 to dance, to provide another woman, and to have sex with them. *People v Rolova* (1986, 3d Dept) 124 App Div 2d 886, 508 NYS2d 653.

Plaintiffs (prostitute and patron of prostitutes) failed to present justiciable controversy, and accordingly did not state cause of action for judgment declaring CLS *Penal* §§ 230.00 and 230.03 unconstitutional as applied to themselves insofar as those statutes criminalize private commercial sex between consenting adults, in absence of showing that (1) they had been arrested, prosecuted, or threatened with prosecution in connection with their prostitution activities, (2) they had reasonable fears of being threatened with arrest or prosecution in future, or (3) criminalization of prostitution inhibited them from engaging in acts of prostitution; furthermore, challenge to criminal prosecution statutes did not present situation which would typically evade review so as to fall within exception to principle that court's power to declare law is limited to determining actual controversies in pending cases since any defendant charged with prostitution or patronizing prostitutes may raise unconstitutionality of statutes as defense. *Cherry v Koch* (1987, 2d Dept) 126 App Div 2d 346, 514 NYS2d 30, app den (1987) 70 NY2d 603, 518 NYS2d 1026, 512 NE2d 552.

Court properly granted defendant's posttrial motion to dismiss action under *NYC Admin Code* § 14-140 seeking forfeiture of his automobile because, with respect to charge of fourth degree patronizing prostitute, undercover officer's testimony did not show sufficient nexus between defendant's use of his car and his alleged fourth degree patronizing of prostitute. *Property Clerk of [redacted] City Police Dep't v Taylor* (1997, 1st Dept) 237 App Div 2d 119, 654 NYS2d 745.

Factors to be considered in dismissing an information in the interest of justice (*CPL* 170.40) are: the nature of the crime; the available evidence of guilt; the prior record of the defendant; the punishment already suffered by the defendant; any prejudice resulting to the defendant by the passage of time; and the impact on the public interest of a dismissal; accordingly, dismissal of misdemeanor charges of patronizing a prostitute (*Penal Law*, § 230.03) against each defendant for allegedly approaching an undercover policewoman and seeking sexual intercourse, in the interest of justice, is not warranted since defendants' cases are not those which cry out for "fundamental justice beyond the confines of conventional considerations" in light of the legislative "get tough policy" raising the penalties faced by "Johns" in an effort to diminish street prostitution and the fact that defendants have suffered no more than any other defendants accused of misdemeanor offenses and the impact to the public if dismissal were granted would be adverse. *People v Izsak* (1979) 99 Misc 2d 543, 416 NYS2d 1004.

The policy of the District Attorney in not granting adjournments in contemplation of dismissal (*CPL* 170.55) as to the crime of patronizing a prostitute (*Penal Law*, § 230.03) and refusing to allow any defendants charged with such offense to take a plea in an attempt to deter street prostitution by placing increased possibilities of incarceration and penalties against "Johns", although unnecessarily rigid bordering on harassment, does not, however, constitute unconstitutional discrimination since an accused does not have a fundamental constitutional right to plead to reduced charges and the District Attorney is merely exercising his substantial prosecutorial discretion to determine "whom, whether and how" to prosecute crimes; although the People's intransigent stand is not the solution to the issue of prostitution, the judiciary should not impede an otherwise legitimate prosecutorial policy unless the most compelling circumstances dictate such intervention. *People v Izsak* (1979) 99 Misc 2d 543, 416 NYS2d 1004.

In order to establish that a law, valid on its face, is unconstitutionally enforced in a discriminatory manner, one must show not only that the law is selectively enforced, but also that the selective enforcement is deliberately based

upon an impermissible standard, which discriminatory intent may be proved by a convincing showing of a grossly disproportionate incidence of nonenforcement against others similarly situated; if a defendant can establish that conscious, intentional discrimination exists in the enforcement of the criminal statute under which he or she is charged, then the defendant is entitled to a dismissal of the prosecution as a matter of law, but the defendant's burden of proof is heavy, partly because there is a presumption that the enforcement of the laws is undertaken in good faith and also because the authorities must be allowed latitude in making law enforcement decisions. Accordingly, although it is reasonable to combine the prostitute and the patron in the category of "similarly situated" persons, the court denied, as premature, defendants' motion for an order dismissing the accusatory instruments against them charging prostitution where they did not present sufficient evidence to prove their claim that the District Attorney or the city police consciously, intentionally discriminate in enforcing the law proscribing prostitution offenses (Penal Law, art 230) by routinely enforcing *section 230.00 of the Penal Law* against female prostitutes while they do not enforce *section 230.03* against their male patrons. *People v Nelson (1980) 103 Misc 2d 847, 427 NYS2d 194.*

Where defendants have not presented sufficient evidence to demonstrate a reasonable probability of success on the merits of their claim that the prostitution law under which they are charged (Penal Law, art 230) is unconstitutionally enforced by the District Attorney and city police, who allegedly routinely enforce *section 230.00 of the Penal Law* against female prostitutes, while they do not enforce *section 230.03* against their male patrons, the court denied as premature defendants' motion for an order granting an evidentiary hearing, without prejudice. *People v Nelson (1980) 103 Misc 2d 847, 427 NYS2d 194.*

Defendants' request for disclosure and inspection of statistical data relating to the arrest and prosecution of persons for prostitution-related offenses, for the purpose of establishing their claim that the law under which they are charged (Penal Law, art 230) is unconstitutionally enforced by the District Attorney and city police, who allegedly routinely enforce *section 230.00 of the Penal Law* against female prostitutes while they do not enforce *section 230.03* against their male patrons, is denied since it does not fit under the categories of discoverable material described in *CPL 240.20* and *240.40*, is not discoverable on the authority of *Brady v Maryland (373 US 83)*, as it does not address the guilt or innocence of the defendants, and, moreover, the claim of discriminatory enforcement should not be treated as a defense to the criminal charge, but as an application to the court for a dismissal or quashing of the prosecution upon constitutional grounds; however, if defendants should seek and obtain the data under the Freedom of Information Law (*Public Officers Law, art 6, §§ 85-90*), the court will allow them to renew their motions for an evidentiary hearing and for dismissal of the accusatory instruments, if they should then decide that such motions would be appropriate. *People v Nelson (1980) 103 Misc 2d 847, 427 NYS2d 194.*

In the prosecution of defendants for patronizing a prostitute in the fourth degree, the phrase "another person" in *Penal Law § 230.02* was given its ordinary and plain meaning so that it applied to the decoy police officer who the defendants solicited to perform a sexual act for money. *People v Bailey (1981, Sup App T) 108 Misc 2d 1075, 442 NYS2d 701.*

Accusatory instrument charging defendant with patronizing prostitute in fourth degree in violation of *CLS Penal § 230.03* would not be dismissed pursuant to *CLS CPL §§ 170.30(1)(a)* and *170.35(1)(a)* since there was no merit in defendant's contention that accusatory instrument was fatally defective in that undercover officer that he solicited was not in fact acting as prostitute and that officer was not "another person" within meaning of *CLS Penal § 230.02*. *People v Sharif (1988, City Crim Ct) 141 Misc 2d 80, 532 NYS2d 709.*

Property Clerk made sufficient showing that respondent's vehicle was "employed in aid or furtherance of crime" so as to be subject to forfeiture under *NYC Admin Code § 14-140*, where it was undisputed that respondent, who was arrested for fourth degree patronizing prostitute in violation of *CLS Penal § 230.03*, suggested that sexual act be performed in his vehicle and that undercover police officer posing as prostitute agreed to so perform act. *Property Clerk, New York City Police Dep't v Small (1992, Sup) 153 Misc 2d 673, 582 NYS2d 932.*

Defendant was not entitled to dismissal of charge of fourth degree patronizing of prostitute on ground that further prosecution against him would constitute double jeopardy, notwithstanding that he paid \$ 1,000 settlement in civil forfeiture proceeding pertaining to automobile he was operating at time of arrest, since settlement was not so disproportionate as to constitute criminal punishment. *People v Milone (1993, City Crim Ct) 158 Misc 2d 316, 600 NYS2d 1010.*

Instrument charging defendant with fourth degree patronizing prostitute was insufficient where undercover police officer was not identified by name or badge number on complaint and supporting deposition filed with court. *People v Zavulunov (1995, City Crim Ct) 165 Misc 2d 205, 629 NYS2d 934.*

NY CLS Penal § 230.03

Accusatory instrument alleging that defendant "agreed to engage in sexual conduct with the informant, which was...sexual intercourse...for \$ d30.00 U.S. Currency" was facially sufficient to charge defendant with fourth degree patronizing prostitute. *People v Bah (1999, City Crim Ct) 180 Misc 2d 39, 688 NYS2d 397.*

Defendant who was charged with fourth degree patronizing prostitute was not entitled to pretrial "Isaacson" hearing to determine whether police violated his due process rights by entrapment, in absence of detailed allegations of prosecutorial misconduct. *People v Bah (1999, City Crim Ct) 180 Misc 2d 39, 688 NYS2d 397.*