



LGIT'S ROLL CALL REPORTER **SEPTEMBER 2006**

THE COMMON LAW CRIME OF INDECENT EXPOSURE ENCOMPASSES INTENTIONAL CONDUCT THAT OCCURS WITHIN A PRIVATE HOME OF A THIRD PARTY

QUESTION: Can a private residence being used by the owner to entertain personal friends constitute a "public place" under the common law crime of indecent exposure?

ANSWER: Yes. What constitutes a "public place" within the meaning of the offense of indecent exposure depends on the circumstances of each case. Under circumstances where the defendant was a guest in the residence of another and, while in an area of the home not traditionally regarded as private, intentionally exposed himself to others, the elements of the offense were satisfied, including the requirement that the indecent exposure occur in a "public place".

CASE: *Wisneski v. State*, Court of Special Appeals, No. 222, September Term, 2005
Decided July 12, 2006

In *Wisneski v. State*, Maryland's Court of Special Appeals was called upon to decide whether the common law crime of indecent exposure encompasses intentional conduct that occurs within a private home of a third party. More generally, the Court had to determine what constituted a "public place" within the meaning of the offense.

The facts in the *Wisneski* case established that on July 1, 2004, Gerald Wisneski visited his friend, Bridgette Penfield, at her trailer home, located in a trailer park in Germantown, Maryland. At around 7 P.M. that evening, Ms. Penfield's neighbors, fifteen-year-old Jennifer James and her older brother, Brandon James, also arrived to visit Ms. Penfield. Ms. James testified that as she and her brother entered the trailer, she saw Wisneski sitting on the "big couch facing . . . the big window pane" and he was "drinking beer." Wisneski "just started talking sexual stuff" to Ms. James, and he asked her if she was "on [her] period" Shortly thereafter, Wisneski stood up and "pulled out his penis" and his testicles from his shorts. Then while Wisneski was holding his penis and his testicles in his hand, he shook them at Ms. James. She turned her head away, and her brother "just started going off" and "tried to fight" Wisneski, but Ms. Penfield "got in the middle of it and then tried to stop it" Wisneski then put his genitals back in his shorts. However, he placed his hands over "his private part and started shaking it." Wisneski left the trailer and went to his home to, according to Ms. James, retrieve a gun. When he returned a few minutes later, Ms. James saw the outline of a gun in Wisneski's clothing. She quickly returned home, told her mother what had occurred, and her mother called the police. The police arrived and took Wisneski into custody.

Wisneski was charged with multiple offenses, including indecent exposure. He was convicted and sentenced to a term of imprisonment, including six months for indecent exposure. At Wisneski's trial, his counsel moved for a judgment of acquittal as to the charge of indecent exposure. He argued that there had been no testimony that the exposure had occurred in a public place. To the contrary, the exposure had taken place in a private residence, which, counsel argued, was not a "place which could be viewed by the public had they been looking" The trial court denied the motion, reasoning that the "public place" element of the crime of indecent exposure is satisfied "if it occurs under circumstances where it could be seen by other people if they just happen to look" Wisneski appealed his conviction.

On appeal, Wisneski contended that, in Maryland, the offense of indecent exposure can only occur in a "public place". Because the exposure took place in the "confines of Bridgette Penfield's private home", Wisneski argued that the element of "public place" was not met. He therefore maintained that the trial court had erred as matter of law in finding that a private residence being used by the owner to entertain three personal friends constituted a "public place" under the common law crime of indecent exposure. The Court of Special Appeals rejected these arguments and affirmed the conviction. In doing so, the Court first recounted the history of the crime of indecent exposure in Maryland, including its requirement that the indecent exposure occur in a "public place". From its review of earlier cases, the Court concluded that what constitutes a "public place" within the meaning of the offense "depends on the circumstances of the case. The place where the offense is committed is a public one if the exposure be such that it is likely to be seen by a number of casual observers" In other words, an exposure is "public", or in a "public place", if it occurs under circumstances such that it "could be seen by a number of persons, if they were present and happened to look." The Court also turned to statutes and court decisions in other states to assist it in determining the meaning of "public place". The consensus in these authorities is that a "public place" is "any place where the conduct may reasonably be expected to be viewed by others." As one court said, "[i]t is the probability of public view that is crucial rather than the ownership or use of the particular real estate upon which the act occurs." In light of these authorities, the fact that Wisneski, who was a guest in a private home, exposed himself to three people in an area of the home that was not generally regarded as private, such as a bedroom or bathroom, and that he had done so intentionally, without permission or consent, was sufficient for the Court to uphold his conviction.

NOTE: The Court in the *Wisneski* case refused to construe the definition of "public place" so narrowly as to apply solely to places that are physically located outdoors or open to the public at large, without any restriction. At Wisneski's trial, however, the State failed to elicit testimony concerning Wisneski's precise location in regard to the "big window pane" or as to his visibility through the window to those outside. If it had done so, the case against Wisneski could have been much stronger. Further, despite the Court's expansive definition of "public place", officers should keep in mind that not every "exposure" is "indecent". Cases in which the accused inadvertently exposes his genitals while in the privacy of a residence or building, such as by carelessly changing clothes in front of a window or by walking around nude in front of his family while in his own home, will assuredly not result in a conviction. Since Wisneski had not exposed himself within the confines of his own home, the Court did "not determine whether his conduct would have been illegal had he exposed himself while in his own home." However, drawing from the Court's emphasis on the intentional and non-

consensual nature of Wisneski's conduct, one could conclude that, even if the conduct had occurred at Wisneski's home, the decision would be unchanged. The rationale for such result would be, as stated by one out-of-state court, "[a] person need not be in a public place to be a member of the public."

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