**HLD, v. 29, n. 4 (April 2001)**

Michigan Appeals Court Upholds Criminal Prosecution of Doctor Under State Criminal Abortion Statute

Defendant Jose Higuera, a doctor who performed abortions, was charged in Michigan state court with violating Michigan's criminal abortion statute (Mich. Comp. Laws � 750.14) by allegedly inducing the abortion of a twenty-eight-week-old fetus. The statute stated that any person who willfully performed abortions would be guilty of a felony and would be guilty of manslaughter if the pregnant woman died. The statute provided an exception to criminal prosecution only in cases in which it was necessary to preserve the life of the mother. Higuera filed a motion to dismiss on the ground that the statute was unconstitutionally vague and unconstitutional on its face, was repealed by implication, and that the complaint was defective for failing to allege the viability of the fetus or the lack of necessity to preserve the life of the mother. The trial court dismissed the charge on the grounds that the statute was repealed by implication and was unconstitutionally vague. The circuit court also upheld the dismissal, but only on the ground that the statute was unconstitutionally vague. The Attorney General appealed the circuit court's ruling.

The Court of Appeals of Michigan reversed the rulings of the trial and circuit courts and reinstated the charge against Higuera. Although the Michigan statute appeared to be contrary to the Supreme Court's ruling in *Roe v. Wade*, the appeals court first held that it was constrained to interpret the statute in light of the Michigan Supreme Court's ruling in *People v. Bricker*, 208 N.W.2d 172 (1973), which was decided after *Roe*. The appeals court noted that in *Bricker*, the Michigan Supreme Court interpreted the Michigan criminal abortion statute to conform with *Roe*, holding that the statute did not apply to abortions authorized by a physician in the exercise of his medical judgment and that physicians were permitted to perform post-viability abortions only when necessary to preserve the life of the mother.

Second, the appeals court rejected Higuera's argument that the statute was repealed by implication because the statute could reasonably be construed to hold the contrary. The appeals court held that because the legislature enacted abortion-related statutes after *Bricker*, the legislature intended to regulate abortions permitted by *Roe*, and did not intend to repeal the prohibition of abortions to the extent permitted bythe federal Constitution.

Third, the appeals court rejected Higuera's argument that the Michigan Supreme Court's discussion regarding the statute's constitutionality in *Bricker* was mere dictum because Bricker was not a physician. The appeals court determined that the constitutionality and scope of the statute after *Roe* were germane to the controversy in *Bricker*, and the supreme court's discussion focused on the statute.

Fourth, the appeals court held that the criminal complaint against Higuera was not defective. The appeals court ruled that if there were any deficiencies in the charge, such as the failure to specifically allege that Higuera believed that the fetus was viable and that he did not believe that an abortion was necessary to preserve the life of the mother, they could be cured by amendment.

Finally, while the appeals court noted that the statute did not state a *mens rea* requirement, it determined that the supreme court in *Bricker* construed the statute to encompass the requirements of *Roe*, including the fact that deference must be given to the subjective good-faith medical judgment of the physician. As a result, the appeals court ruled that to obtain a conviction on remand the prosecution must prove that the fetus was twenty-eight weeks old and viable; that Higuera subjectively believed the fetus was twenty-eight weeks old and viable; and that Higuera did not hold the subjective belief or medical judgment that an abortion was necessary to preserve the life or health of the mother.

A dissenting opinion stated that the statute was unconstitutionally vague under *Roe*, despite the supreme court's construction of the statute in *Bricker*. The dissent argued that the statute did not recognize the "constitutionally conclusive medical judgment" of the physician regarding viability and maternal health, did not specify whether an objective or subjective standard would govern, and did not include a *mens rea* requirement.

**People v. Higuera**, No. 213557, 2001 WL 92740 (Mich. Ct. App. Jan. 30, 2001) (21 pages).

- See more at: https://www.healthlawyers.org/News/Health%20Law%20Digest/Pages/Michigan\_Appeals\_Court\_Upholds\_Criminal\_Prosecution\_of\_Doctor\_Under\_State\_Criminal\_Abortion\_Statute.aspx#sthash.59uMST7y.dpuf

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