STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

April 4, 1977

ATTORNEY GENERAL OPINION NO. 77-120

Mr. Dennis Sauter
Riley County Attorney
Riley County Courthouse
5th & Poyntz Streets
Manhattan, Kansas 66502

RE: Crimes and Offenses - Prostitution - Elements

SYNOPSIS: K.S.A. 21-3515 does not require an actual exchange of consideration between the parties as an element of the offense of patronizing a prostitute. Under K.S.A. 21-3515, a prostitute includes any person who agrees to perform an act of sexual intercourse or any unlawful sexual act for hire, and any person who solicits and obtains such agreement from another, including a police officer acting in an official undercover capacity, is liable to prosecution for patronizing a prostitute. Under the Kansas Criminal Code, oral copulation between consenting adults of the opposite sex is not an unlawful sexual act.

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Dear Mr. Sauter:

You inquire concerning certain provisions in Art. 35, ch. 21, K.S.A., and particularly, concerning the elements of the offense of patronizing a prostitute, as that offense is defined by K.S.A. 21-3515. It provides in pertinent part thus:

> "Patronizing a prostitute is . . . . (b) Knowingly hiring a prostitute to engage in sexual intercourse or any unlawful sexual act."

You inquire, first, whether the term "hiring" requires that consideration pass between the parties. In *Insurance Co. of North America v. Crippen*, 223 S.W.2d 293, 301 (Tex.Civ.App.), the Court

stated that "The word 'hire' means price, reward or compensation paid or contracted to be paid . . . ." [Emphasis supplied.] The term "hiring" does not appear to have been used in this provision in any technical sense. The term includes an agreement by the accused to engage the services of a prostitute for sexual intercourse or unlawful sexual acts, in return for payment of compensation therefor as consideration. The hiring is complete when the agreement is reached, whether the agreement is ever honored or executed by an actual exchange of consideration.

Secondly, you inquire concerning application of the statute to instances in which the person solicited by the accused is a policewoman acting in a "decoy" or undercover role. It is an element of the offense of patronizing a prostitute that the person patronized or hired be a "prostitute." The statute specifies the prohibited conduct as "knowingly hiring a prostitute . . . ." Obviously, the accused may claim that elements of the offense cannot be established, because the person purportedly hired was not a prostitute, first, and secondly, that as a result, he could not "knowingly" have hired a "prostitute." The term "prostitute" is not defined by the Criminal Code. However, K.S.A. 21-3512 defines "prostitution" as

> "performing an act of sexual intercourse for hire, or offering or agreeing to perform an act of sexual intercourse or any unlawful sexual act for hire."

It is reasonable to assume that for purposes of prosecution under the Kansas Criminal Code, a prostitute is one who commits or performs an act of prostitution.

The term "knowingly" requires that the act of "hiring" have been done purposefully and intentionally. K.S.A. 21-3201(1) states in pertinent part thus:

> "Criminal intent may be established by proof that the conduct of the accused person was willful or wanton. Proof of willful conduct shall be required to establish criminal intent . . . ."

Subsection (2) states thus:

> "Willful conduct is conduct that is purposeful and intentional and not accidental. As used in this code, the terms 'knowing,' 'intentional,' 'purposeful,' and 'on purpose' are included within the term 'willful.'"

If the evidence establishes that the accused sought and entered into an agreement with a policewoman, unaware of her official mission, but knowingly and intentionally intending to procure her services for sexual intercourse or an unlawful sexual act, the prosecution has established a prima facie case in my judgment. The defendant may obviously wish to plead lack of requisite knowledge. However, in effect, it is a plea that the offense was legally incapable of being committed because the policewoman was not a prostitute. K.S.A. 21-3203(1) states thus:

> "A person's ignorance or mistake as to a matter of either fact or law . . . is a defense if it negatives the existence of the mental state which the statute prescribes with respect to an element of the crime."

The fact that the defendant was mistaken as to the identity of the person whose favors he solicited does not necessarily and as a matter of law negates the existence of the prohibited purposefulness and intentionality. While the defendant may have been mistaken as to a matter of fact, if the evidence establishes that he intentionally and purposefully engaged the services of the officer for the purposes of sexual intercourse, although unaware that the person was in fact a law enforcement officer, then the accused may be found to have acted with the requisite knowledge and intent. Needless to say, the defendant is presumed to know the law, and in this instance particularly, what constitutes the offense of prostitution. If the officer, acting in a covert role, accepted an offer or solicitation from the accused, the accused is chargeable, in my judgment, with having hired, with intent to do so, a person to engage in sexual intercourse or unlawful sexual conduct, for that acceptance of the accused offer by the officer in and of itself renders the accused a knowing party to engaging, retaining or employing a person to perform an act of prostitution, i.e., to patronizing a prostitute. If the evidence before you establishes such conduct, I believe that such evidence constitutes a prima facie case establishing the elements of the offense. Obviously, it is impossible to foresee the persuasiveness of any defenses which might be raised. However, insofar as it is possible for me to respond to your request purely as a matter of law, it is my judgment that no element of the offense of patronizing a prostitute is negated merely because the person solicited by the accused is an undercover police officer.

In *People v. Bronski*, 76 Misc.2d 341 (1973), the defendant was accused of soliciting an undercover policewoman to commit an act of sexual intercourse. The question of price was settled

by agreement between the accused and the policewoman upon a specified sum. The defendant argued that the complaint failed to allege a crime on the ground that the statute was applicable only where the person solicited was in fact a prostitute. Section 230.05 of the Penal Laws of New York provided in pertinent part thus:

> "A person is guilty of patronizing a prostitute when
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> * * *
>
> (2) He pays or agrees to pay a fee to another person pursuant to an understanding that in return therefor such person or a third person will engage in sexual conduct with him . . . ."

The court stated thus:

> "While entitled 'patronizing a prostitute,' the body of the section clearly states that the conduct intended to be proscribed is conduct directed to 'another person.' It is well established that the character of a statute is to be determined by its provisions and not be its title. . . . . The statute here is aimed at a person who seeks out sexual activity for a fee with any 'other person.' This 'other person' is not required to be of any particular class of individual nor even of the opposite sex . . . . for it is the conduct of the solicitor, and not the solicited, which is prescribed."

Unlike the New York provision, K.S.A. 21-3515 requires that the person who is "hired" be a "prostitute." How is a prostitute to be identified? A prostitute under the Kansas Criminal Code is one who engages in an act of prostitution as defined by K.S.A. 21-3512, and thus, includes any person who performs an act of sexual intercourse for hire, or offers or agrees to do so. If the officer accepted the offer of the accused, the officer thereby committed an act of prostitution as that term is defined by law, and the accused is thus chargeable with patronizing a prostitute. However, while the acts of the officer may fall within the definition of the term "prostitution" in the Kansas Criminal Code, and thus render the accused chargeable with legal and actual knowledge that he was patronizing a person whose conduct constituted prostitution under Kansas law,

the officer clearly acted without the requisite intent to engage in sexual intercourse with the accused, and thus acted without the requisite intent. Under K.S.A. 21-3201, criminal intent is an essential element of the offense of prostitution, and thus, the officer would not be susceptible to prosectuion. However, the knowledge which may be imputed to the accused obviously does not depend upon the state of mind of the officer or person solicited. It is necessary only that conduct of the officer which is perceived and observed by the accused be that which is proscribed as prostitution. He is, of course, chargeable with knowledge of what constitutes prostitution under Kansas law, and in my judgment, the mistake of the accused as to the identity of the person solicited does not negative the requisite intent and intent on the part of the accused to employ a prostitute, and his knowledge that he had done so upon the acceptance of his offer. Obviously, the defense may seek to establish as a matter of fact that he lacked the necessary intention and that he did not act knowingly. However, as indicated above, I believe that the legal elements of the offense may be established by a showing that the accused retained or employed the services of the officer, and that he did so, although unaware of her undercover status, with knowledge and intent to procure her services for sexual intercourse or other sexual conduct for hire. The officer's acceptance of the offer, if it is established by the evidence, renders the accused chargeable with knowledge that the person solicited committed an act of prostitution and was therefor, for purposes of his knowledge, a prostitute, although her conduct was undertaken in fact without the necessary criminal intent which would subject her to prosecution.

Finally, you ask whether an agreement between two adult persons to perform an act of oral copulation for hire is an "unlawful sexual act." K.S.A. 21-3505 defines the offense of sodomy as

> "oral . . . copulation between persons who are not husband and wife or consenting adult members of the opposite sex, or between a person and an animal, or coitus with an animal. Any penetration, however slight, is sufficient to complete the crime of sodomy."

Oral copulation between consenting adult persons of the opposite sex is not an unlawful sexual act under the Kansas Criminal Code. Therefore, it is not an "unlawful sexual act" as that phrase is used in either K.S.A. 21-3512 or K.S.A. 21-3515. Mere solicitation, without more, does not constitute an attempt. *State v. Bereman*, 177 Kan. 141, 276 P.2d 364 (1954).

Thus, to recapitulate, first, K.S.A. 21-3515 does not require an actual exchange of consideration between the parties as an element of the offense of patronizing a prostitute. Under K.S.A. 21-3515, a prostitute includes any person who agrees to perform an act of sexual intercourse or any unlawful sexual act for hire, and any person who solicits and obtains such agreement from another, including a police officer acting in an official undercover capacity, is liable to prosecution for patronizing a prostitute. Under the Kansas Criminal Code, oral copulation between consenting adults of the opposite sex is not an unlawful sexual act.

Yours very truly,

CURT T. SCHNEIDER
Attorney General

CTS:JRM/TWR:en