THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. CR 460137**
Plaintiff	)	
	)	**MEMORANDUM OF OPINION**
	)	**AND ORDER**
vs	)	
	)	
DARNELL FORTE	)	
Defendant	)	

FRIEDMAN, J.:

{¶1} This is a case that has attracted a good deal of public interest, due not to any inherent notoriety of the parties, nor to any particularly unusual nature of the crime charged or the facts alleged. Rather, it is the peculiar nature of defendant's motion to dismiss that has raised both media and public concern.

{¶2} On December 15, 2004, the grand jury returned an indictment charging the defendant with domestic violence, in violation of Ohio Revised Code §2919.25, a felony of the fourth degree. The single count in the indictment charges that, on August 26, 2004, and in Cuyahoga County, Ohio, he "unlawfully did knowingly cause or attempt to cause physical harm to Lakisha Johnson, a family or household member…." The indictment further alleges that the defendant has two prior convictions for domestic violence (in April and November, 2002), as well as a conviction for Stalking (September, 2003).[1] Under Ohio law a first offense domestic violence charge is a first degree misdemeanor, with a potential jail sentence of up to six months and a fine of up to one thousand dollars. Where a defendant has a prior conviction for domestic violence or any of certain other specified offenses, a subsequent domestic violence charge is a fourth degree felony, with a possible prison term of six to eighteen months and a fine of up to

twenty-five hundred dollars. Yet another successive conviction becomes a third degree felony, with a potential prison term of one to five years and a fine of as much as $10,000.00.

{¶3} The Court further notes that assault (Revised Code §2903.13) (commonly referred to as "simple assault") is a lesser included offense to a charge of domestic violence. Assault consists of knowingly causing or attempting to cause physical harm to another. Unlike domestic violence, assault may not be elevated to a felony, regardless of whether there is a prior conviction.[2] Thus, the *only* distinction between the two offenses is the status of the victim. An assault upon a stranger, a friend, a co-worker is always a misdemeanor, while an assault upon a "family or household member" is a misdemeanor the first time, and a felony thereafter.

{¶4} For the purpose of determining whether an assault should be charged as domestic violence, Ohio Revised Code §2919.25(F)(1) defines "family or household member" as:

> (a) Any of the following who is residing or has resided with the offender:
> (i) A spouse, a person living as a spouse, or a former spouse of the offender;
> (ii) A parent or a child of the offender, or another person related by consanguinity or affinity to the offender;
> (iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.
> (b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

The statute further defines "person living as a spouse" as: "a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five

---

[1] Although not germane to this discussion, the Court notes that the defendant has an extensive criminal record, which includes—in addition to these offenses, at least nine prior convictions for drug-related offenses, and has served several prison terms.

years prior to the date of the alleged commission of the act in question." Revised Code §2919.25(F)(2).

{¶5} Although the domestic violence statute has been amended several times since its original passage in 1979, its essence has remained unchanged. It may be noted that, although the statute refers to "common law marital relationship", that status was in most respects abolished in Ohio as of October 10, 1991.[3]

{¶6} At the General Election held November 2, 2004, the voters of Ohio approved a constitutional amendment (Art. XV, Section 11) that was promoted as restricting marriage to the relationship between one man and one woman. However, the second sentence of that amendment further provides that: "This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

{¶7} Before the Court at this time is the motion of the defendant to dismiss the indictment. It is his contention that, as applied to unmarried persons who are cohabiting, Ohio's domestic violence statute in essence recognizes a legal status for such relationships that in a crucial respect "intends to approximate the design, qualities, significance or effect of marriage." Defendant argues that, to the extent this is true, R.C. §2919.25 is in conflict with Art. XV, Section 11, of the Ohio Constitution, and thus is unenforceable.[4]

---

[2] If an assault is committed with a deadly weapon or causes serious injury, it may be charged as a felonious assault, Ohio R. C. §2913.11; however, that issue is not relevant to the case now before this Court.

[3] R.C. §3105.12(B) (1) On and after October 10, 1991, except as provided in divisions (B)(2) and (3) of this section, common law marriages are prohibited in this state, and the marriage of a man and woman may occur in this state only if the marriage is solemnized by a person described in section 3101.08 of the Revised Code and only if the marriage otherwise is in compliance with Chapter 3101. of the Revised Code.

[4] The Court observes that the defendant has not complied with R.C. §2721.12, which requires that a party challenging the constitutionality of a statute serve the Attorney General with the complaint. However, as the Court of Appeals for Cuyahoga County held in *State v. Bradley*, No. 79094 (8th District, July 11, 2002), this mandate applies only to actions in which declaratory relief is sought. As in that action, no such relief is requested in this case. "Moreover, no challenge to the constitutionality of the statute was identified in a complaint, as the statute envisioned. Thus the requirement that the attorney general be notified does not apply to the case at bar." *Id.*

{¶8} Because of the great public interest and unique legal issues raised by defendant's motion and the states opposition, the Court held a hearing January 27, 2005, at which both were afforded an opportunity to argue at length. In addition, the American Civil Liberties Union of Ohio was granted leave to file a brief *amicus curiae* in support of the State's position.

{¶9} The State contends that the defendant's reading of Art. XV, §11, is improperly broad, and that the amendment instead "…simply defines the legal scope of marriage in Ohio." Thus construed, the State argues, the amendment "…does not affect unrelated criminal statutes such as Ohio's law against domestic violence, which regulates and defines criminal conduct." This Court has read, and re-read, Art. XV, §11, again and again, and must conclude that in this respect the State's position is overly simplistic and ultimately unconvincing. Nevertheless, and for reasons set forth herein, the Court finds that it is unnecessary and inappropriate to decide the issues raised by counsel in the context of this case.

{¶10} This Court is fully aware that judicial restraint compels it to avoid deciding constitutional issues "unless absolutely necessary." *In re Boggs* (1990) 50 Ohio St. 3d 217, 221; see also *State, ex rel. Clarke v. Cook* (1921) 103 Ohio St. 465:

> It is an old and uniformly well-settled rule that questions involving the constitutionality of statutes will not be determined unless such determination is essential to the rendition of a proper judgment in the instant case.

Consistent with that mandate, the Court notes that, in their haste to join battle over Issue 1, both the defendant and the State have ignored a crucial procedural issue, that is: does Art. XV, §11, retroactively affect a charge of domestic violence that arose prior to its effective date? As previously noted, the indictment charges that the defendant committed the alleged domestic violence on August 26, 2004. Art. II, §1b of the Ohio Constitution provides that:

> Any proposed…amendment to the constitution submitted to the electors…, if approved by a majority of the electors voting thereon, shall take effect thirty days after the election at which it was approved and shall be published by the secretary of state.

Thus, Art. XV, §11 did not take effect until December 2, 2004, thirty days after being approved by the voters at the general election. "Constitutions as well as statutes are construed to operate prospectively only, unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable question." *Shreveport v. Cole* (1889), 129 U.S. 36, 43; *Buckeye Churn Co. v. Abbott* (1926), 115 Ohio St. 152; *Coleman v. Adult Parole Authority* (1996), 115 Ohio App. 3d 212. The text of Issue 1 did not clearly provide for retrospective application; therefore, it took effect on December 2, 2004, and any charge of domestic violence that arose prior to that date must be governed by the legal relationship of the defendant and the alleged victim existing as of the date of the alleged offense. The Court is compelled to conclude that, accordingly, the statute properly recognizes that relationship between the defendant and the alleged victim as being one of family or household members as of the date of the alleged offense. That being the case, the defendant's motion is not well taken and must be overruled.

{¶11} Finally, it is noted that, both in its brief in opposition to defendant's motion and in oral argument, the State expressed concern as to the potential Fourteenth Amendment consequences if the Court were to find that R.C. §2919.25 is in conflict with Issue 1. As its brief notes:

> [Issue 1] would arbitrarily discriminate against a class of persons based on marital status and immediately deny them the protections afforded by Ohio's domestic violence law. There can be no rational relationship to a legitimate government interest if Issue 1 is construed to strip the protections of the domestic violence law from unmarried persons. Such an arbitrary and discriminatory outcome would therefore violate the Equal Protection Clause of the Federal Constitution.

The State cites specifically to *Romer v. Evans*, 517 U.S. 620 (1996), in which the Supreme Court held that:

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Id., at 633. As the State further cites, the Colorado amendment *sub judice* in *Romer* was found to be:

> …a status-based enactment divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

Id., at 635. Drawing the analogy to *Romer,* the State argues that, if the Court agrees with defendant that Issue 1 bars unmarried persons from the protection of the Ohio domestic violence law, "then issue 1 would violate federal guarantees of Equal Protection." The State goes on to claim that:

> Ohio's domestic violence law unambiguously aims to protect 'family or household members' from abuse. …Nowhere does defendant show a legitimate government interest for limiting the definition of 'family or household members' to only married persons.

The State concedes that this would lead to a "conundrum" that "cannot be constitutionally solved. If Issue 1 applies, then such a classification is 'undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* The Court shares the State's concern as to the Fourteenth Amendment implications of this case, but finds that these implications have not been addressed adequately thus far. In light of the Court's ruling on other grounds, however, that issue need not be decided at this juncture.

{¶11.} Both the State and the *amicus curiae* brief filed by the American Civil Liberties Union of Ohio refer to the potential dire consequences if the court should find a conflict between Issue 1 and the domestic violence law. The ACLU asserts that: "The people of this state did not, by enacting Issue 1, intend to permit persons to live together without the benefit of marriage to abuse one another. To suggest so is ludicrous." The State goes so far as to cite an alarmist newspaper headline: "CLAIM: UNWED ABUSE VICTIMS LEFT UNPROTECTED UNDER ISSUE 1." This Court shares the concern that persons living together as household members—whether married or unmarried, and whether in same-sex or opposite-sex relationships, should be protected against violence committed by their partners. Nevertheless, such hysterical references not only are a distraction, but in fact distort the significance of the very real issues presented. Even if this

Court, or another court, ultimately were to find that §2919.25 is unenforceable as to an unmarried "household member," an offender would nevertheless be subject to charges of assault or felonious assault. Although the immediate relief of a Temporary Protection Order (pursuant to §2919.26) might thereby be precluded, equivalent relief would remain available by way of a bond condition of no contact with the victim.

{¶12.} As a final aside, the Court notes that the dire consequences of any potential conflict between Issue 1 and the Domestic Violence laws could be obviated by the General Assembly simply by amending the definitions in those laws; however, it is far beyond the jurisdiction of this Court to suggest specific language for addressing this issue.

{¶13.} For the reasons set forth herein, the Court hereby finds that defendant's motion to dismiss is not well taken and is hereby OVERRULED.

IT IS SO ORDERED

_____

Judge Stuart A. Friedman

Dated: February 11, 2005