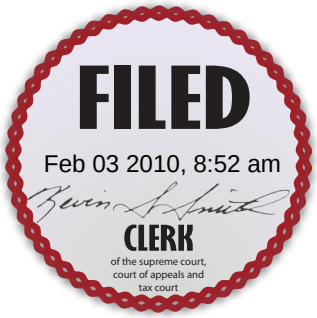
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE
COURT OF APPEALS OF INDIANA

APRIL CAMPBELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0904-CR-365
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Barbara A. Collins, Judge
Cause No. 49F08-0804-CM-053466

FEBRUARY 3, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

GARRARD, Senior Judge

After a bench trial before a Commissioner, April Campbell was convicted of public indecency, by engaging in fellatio in a public place, a Class A misdemeanor.

Her appeal challenges the sufficiency of the evidence.

The state's only witness was the arresting officer, Brady Ball. Disregarding the officer's conjecture, he testified that on the afternoon of February 21, 2008, he was parked southbound on an access road that ran parallel with Lynhurst Drive at about the 1800 block. He was there on a narcotics investigation watching a certain house and who was coming and going to that location. His location was above Lynhurst, which was slightly downward to the east. There is nothing in the record to indicate how far the access road was from the southbound lane of Lynhurst Drive.

About 4:00 o'clock he observed a Ford Windstar minivan traveling north on Lynhurst at a speed consistent with the flow of traffic. Looking across the space between the access road and Lynhurst and the southbound lane of Lynhurst he observed that a man was driving and a woman passenger had her head down in his lap moving her head around. He decided to follow them and began to do so.

He pulled in behind them and could see through the back window that the woman's head and body were still on the driver's side and her head was still down[1]. The two vehicles drove almost all the way up to Morris Street before the woman sat up. As they passed through the intersection of Lynhurst Drive and Washington Street, he activated his lights and conducted a traffic stop. The van did not stop immediately but

[1] We note that in the probable cause affidavit Officer Ball stated that he followed the minivan from about two car lengths back with two cars in front of him until they reached Washington Street.

continued to the entry to a convenience store on the left where it turned in and parked in a parking place. During this time the officer could see the man look down a couple of times and could see his arms and shoulders move. The officer approached the van "real quick." (Tr. at 8). He saw that the man was adjusting his pants and there was liquid on his pants. The woman was using toilet paper or some kind of napkin to wipe her hands. Officer Ball then arrested them.

The statute, Ind. Code § 35-45-4-1, declares that a person who knowingly or intentionally, in a public place … engages in deviate sexual conduct …commits public indecency. The purpose of the statute is to protect the non-consenting viewer who might find such a spectacle repugnant. *Whatley v. State*, 708 N.E.2d 66, 69 (Ind. Ct. App. 1999).

Perhaps if the standard of proof were a preponderance of the evidence, we might be bound to affirm. But it is not. To properly secure a conviction the state was required to prove Ms. Campbell guilty beyond a reasonable doubt. The testimony of Officer Ball failed to do so.

We therefore reverse the conviction and order the defendant discharged.

Reversed.

RILEY, J., and BAILEY, J., concur.