



Pennsylvania Statutes Allowing for Criminal Prosecution based on HIV Status

Pennsylvania does not have an HIV-specific criminalization law, but the Crimes Code¹ contains a few HIV-specific sentence enhancements in prison and sex work contexts. Generally applicable criminal laws have been used to prosecute people based on HIV status.

HIV-SPECIFIC CRIMES

1. Assault by Prisoner

If an incarcerated person “infected by communicable disease, including ... HIV” intentionally or knowingly causes another person to come into contact with bodily fluids “by throwing, tossing, spitting or expelling,”² that person can face an additional sentence of up to ten years.³ If this “assault” was committed against a correctional facility employee, the sentence *must* run consecutive to the current sentence.⁴ Actual HIV transmission or even the remote possibility of HIV transmission is not a factor in Assault by Prisoner offenses.

In 2009, an HIV-positive incarcerated woman was convicted of Assault by Prisoner for spitting at another inmate. She received an additional ten years on her sentence.⁵

2. Prostitution while HIV-positive

In Pennsylvania, prostitution is a misdemeanor unless one of the parties knows he or she is HIV- positive.⁶ HIV-related prostitution offenses are felonies carrying a maximum sentence of seven years.⁷ Actual HIV transmission is not required for prosecution under this statute. This statute does not differentiate between sexual acts that carry a risk of HIV transmission and those that do not. The use of condoms or other protection is not a defense.

GENERAL CRIMINAL LAWS USED TO PROSECUTE PEOPLE FOR HIV

1. Reckless Endangerment

In a 2006 case, *Commonwealth v. Cordoba*, a man was charged with reckless endangerment for failing to disclose his HIV status to his sexual partner.⁸ Reckless Endangerment is conduct that places or may place another person in danger of death or serious bodily injury.⁹ After a tortured procedural history, the Commonwealth appealed to the Superior Court on the question, *inter alia*, of whether it failed to make a prima facie case of

1 Title 18 Pa.C.S Crimes and Offenses (2012).

2 18 Pa.C.S. § 2703 (a).

3 18 Pa.C.S. §§ 106(3), 1103(2).

4 18 Pa.C.S. § 2703 (b).

5 *Commonwealth v. Visnesky*, CP-66-CR-0000104-2009 (Pa.C.P Wyoming 2009).

6 Felony Prostitution, 18 Pa.C.S. § 5902 (a)(4); Felony Promoting Prostitution, § 5902(v); Felony Patronizing a Prostitute, § 5902(e)(4).

7 18. Pa.C.S. § 1103(3).

8 *Commonwealth v. Cordoba*, 902 A.2d 1280 (Pa. Super. 2006).

9 18. Pa.C.S. § 2705.

reckless endangerment, given the fact the sex engaged in (oral sex with ejaculation on the face and chest) has an extremely low transmission risk and that the complaining party did not become infected. The Superior Court held a charge of reckless endangerment may be sustained with a only a *possibility* of risk of harm, regardless of the likelihood of the harm occurring.¹⁰ The case was then returned to the Court of Common Pleas, where it was dismissed because the complaining witness failed to testify.¹¹

Disclosure of HIV status is a defense against prosecution for sero-discordant sexual activity under the Reckless Endangerment statute.

2. Aggravated Assault

Aggravated Assault is causing or attempting “to cause serious bodily injury to another ... under circumstances manifesting extreme indifference to the value of human life,”¹² Aggravated assault is a first degree felony carrying up to a 20-year incarceration sentence,¹³ (compared with simple assault, generally a second degree misdemeanor carrying a two year maximum).¹⁴ A few cases in the 1990’s led to conviction for Aggravated Assault because of the defendant’s HIV status. The assaults in question involved biting¹⁵ and throwing feces¹⁶ - not generally considered “serious bodily injury.” It was only the HIV status of the defendants that made the assaults “serious,” despite the fact that HIV transmission was not possible.

3. Attempted Murder

In a late 1990s case, an HIV-positive man was charged with attempted third-degree murder for failing to disclose his status in five consensual sexual relationships. The defendant died before the case could be tried.¹⁷

4. Terroristic Threats

In a 2004 case, *Commonwealth v. Walker*, an HIV-positive man was convicted of making terroristic threats when he scratched a police officer and told the officer he had open cuts on his hands and said “I’m taking you with me.”¹⁸ Terroristic Threats is the communication, direct or indirect, of a threat of violence “with intent to terrorize another.”¹⁹ It is a first-degree misdemeanor,²⁰ carrying a maximum five-year imprisonment sentence.²¹

10 *Cordoba*, 902 A.2d at 1289.

11 Order Granting Petition for Writ of Habeas Corpus, *Cordoba*, CP-06-CR-0000586-2005 (Pa.C.P. Berks, Nov. 29 2007).

12 18 Pa.C.S. § 2702(a)(1).

13 18 Pa.C.S. § 1103(1).

14 18 Pa.C.S. §§ 2701(b), 1104(2).

15 *Commonwealth v. Perez*, CP-39-CR-0001227-1998 (Pa.C.P. Lehigh 1998) (HIV-positive man convicted of Aggravated Assault for biting a security guard).

16 *Commonwealth v. Brown*, 605 A.2d. 429 (Pa. Super. Ct. 1992) (HIV-positive inmate convicted of Aggravated Assault for throwing fecal matter at a prison guard).

17 Debbie Garlicki, *Man Who Allegedly Infected with the AIDS Virus Dies*, MORNING CALL (Allentown, PA), Nov. 20, 1999. available at http://articles.mcall.com/2000-12-01/news/3330315_1_aids-virus-infected-murder-charge.

18 *Commonwealth v. Walker*, 836 A.2d 562 (Pa. Super Ct. 2004).

19 18 Pa.C.S. § 2706(a)(1).

20 18 Pa.C.S. § 2706(d).

21 18 Pa.C.S. § 107(b)(6).