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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001647-MR

MARK STINSON — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 09-CR-00316

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

WINE, JUDGE: On December 3, 2009, a Madison County grand jury indicted Mark Stinson for first-degree sexual abuse under Kentucky Revised Statute ("KRS") 510.110(1)(d). The indictment specifically alleged that Stinson committed the offense "by being a person in a position of authority and subjecting

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

L.P. to sexual contact and engaging in masturbation in the presence of L.P., a minor less than eighteen years old." L.P. was the niece of Stinson's wife and, at the time of the offense, was 17 years old. The alleged conduct occurred while L.P. was staying with Stinson family during the summer of 2009.

On May 24, 2010, Stinson filed a motion seeking to have the indictment dismissed on the grounds that KRS 510.110(1)(d) is unconstitutionally vague and overbroad in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Stinson properly notified the Kentucky Attorney General of his constitutional challenge pursuant to KRS 418.075(1) and Kentucky Rule of Civil Procedure ("CR") 24.03. Around the same time, Stinson tendered proposed jury instructions and filed a motion for the court to decide whether "lack of consent" is an element of the offense charged under KRS 510.110(1)(d).

Initially, the court orally denied the motion on June 1, 2010. Subsequently, on August 17, 2010, the trial court entered a written order denying the motion, finding that KRS 510.110(1)(d) is not unconstitutionally vague or overbroad. Additionally, the trial court rejected the proposed instructions, concluding that KRS 510.110(1)(d) makes a minor under the age of 18 incapable of consenting to sexual contact by a person in a position of authority.

After the court orally denied the motion and rejected the proposed jury instructions, Stinson entered an *Alford*[2] plea to the charge of first-degree

[2] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

sexual abuse. He specifically reserved his right to appeal the trial court's rulings on the constitutional and jury instruction issues pursuant to Kentucky Rule of Criminal Procedure ("RCr") 8.09. In exchange for the plea, the Commonwealth recommended a sentence of one year, which the trial court imposed on August 12, 2010. Stinson now appeals to this Court.

Stinson primarily argues that the trial court should have dismissed the indictment because KRS 510.110(1)(d) is unconstitutionally vague and overbroad. While a trial court lacks jurisdiction to dismiss an indictment prior to trial for lack of evidence, a court may dismiss an indictment for failure to charge an offense. *Commonwealth v. Isham*, 98 S.W.3d 59, 61-62 (Ky. 2003), *citing* RCr 8.18. If the constitutional challenge to the statute is valid, then a trial court has the authority to dismiss a charge on the ground that the indictment fails to charge an offense. *Commonwealth v. Hay*, 987 S.W.2d 792, 795 (Ky. App. 1998), *citing Commonwealth v. Foley*, 798 S.W.2d 947 (Ky. 1990), *overruled on other grounds in Martin v. Commonwealth*, 96 S.W.3d 38 (Ky. 2003). Therefore, Stinson properly raised the constitutional issue before the trial court.

Nevertheless, acts of the General Assembly carry a presumption of constitutionality and will not be invalidated as unconstitutional unless it clearly, unequivocally, and completely violates provisions of the constitution. *Cornelison v. Commonwealth*, 52 S.W.3d 570, 572 (Ky. 2001). The Commonwealth does not bear the burden of establishing the constitutionality of a statute. Rather the party who challenges the validity of an act bears the burden to sustain such a contention.

Id. at 572-73. The issue of whether a statute is unconstitutional is a question of law subject to *de novo* review. *Wilfong v. Commonwealth*, 175 S.W.3d 84, 91 (Ky. App. 2004).

Since Stinson is challenging the application of KRS 510.110(1), we must first look to the text of that statute. KRS 510.110 defines the offense of sexual abuse in the first degree. In pertinent part, subsection (1)(d) provides that a person is guilty of the offense of sexual abuse in the first degree when:

> Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she, regardless of his or her age, subjects a minor who is less than eighteen (18) years old, with whom he or she comes into contact as a result of that position, to sexual contact or engages in masturbation in the presence of the minor and knows or has reason to know the minor is present or engages in masturbation while using the Internet, telephone, or other electronic communication device while communicating with a minor who the person knows is less than sixteen (16) years old, and the minor can see or hear the person masturbate.

Stinson first argues that KRS 510.110(1)(d) is unconstitutionally vague because it fails to adequately define the terms "position of authority" or "position of special trust." KRS 532.045(1) defines these terms as follows:

> (a) "Position of authority" means but is not limited to the position occupied by a biological parent, adoptive parent, stepparent, foster parent, relative, household member, adult youth leader, recreational staff, or volunteer who is an adult, adult athletic manager, adult coach, teacher, classified school employee, certified school employee, counselor, staff, or volunteer for either a residential treatment facility, a holding facility as defined in KRS 600.020, or a detention facility as defined in KRS 520.010(4), staff or volunteer with a youth services

> organization, religious leader, health-care provider, or employer;
> (b) "Position of special trust" means a position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the minor . . . .

Stinson contends that the statutory definitions of the terms "position of authority" and "position of special trust" fail to provide sufficient guidance as to what intimate relationships are prohibited. To avoid being void for vagueness, a criminal statute must define an offense with sufficient clarity that persons of ordinary intelligence "can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Matheney v. Commonwealth*, 191 S.W.3d 599, 626 (Ky. 2006), *quoting Kolender v. Lawson*, 461 U.S. 352, 357–58, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903 (1983). The vagueness doctrine attempts to ensure fairness by requiring an enactment to provide: "(1) 'fair notice' to persons and entities subject to it regarding what conduct it prohibits; and (2) sufficient standards to those charged with enforcing it so as to avoid arbitrary and discriminatory application." *Lexington Fayette County Food and Beverage Ass'n v. Lexington–Fayette Urban County Government*, 131 S.W.3d 745, 754 (Ky. 2004). *See also Martin v. Commonwealth*, 96 S.W.3d 38, 59 (Ky. 2003).

However, simply because a criminal statute could have been written more precisely does not mean the statute as written is unconstitutionally vague. *Commonwealth v. Kash*, 967 S.W.2d 37, 43 (Ky. App. 1997). Furthermore, a

person to whom the statute clearly applies cannot successfully challenge it for vagueness as applied to the conduct of others. *Id.* at 42. At the time the sexual contact occurred, Stinson was an adult relative of L.P. Stinson and his wife were exercising parental authority over L.P. while she was staying in their household over the summer. Even if the statutory definitions of "position of authority" and "position of special trust" are potentially vague when applied to other situations, they clearly apply to Stinson's situation. Therefore, the statute cannot be considered to be unconstitutionally vague as applied to Stinson.

Stinson next argues that KRS 510.110(1)(d) is unconstitutionally overbroad. The vagueness and overbreadth doctrines are related in that they both prohibit the use of overly ambiguous language in penal provisions, which sometime have the effect of limiting constitutionally-protected activity. *Wilfong v. Commonwealth*, *supra* at 95. However, the vagueness doctrine is rooted in due process principles and is directed toward ensuring fair notice in the clarity and precision of penal provisions. In contrast, the overbreadth doctrine focuses on a statute's potential impact on the exercise of a fundamental right. *Id.*

While intimate sexual relationships between consenting adults are protected, *see e.g. Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), the state has a compelling interest in protecting minors from unlawful sexual contact or exploitation. *See e.g. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Stinson contends that, since 16-17 year olds are able to legally consent to sexual activity, the legislature cannot

limit those relationships even where they may be considered distasteful or unwise to the public. However, it is well-established that it is within the State's constitutional power to regulate the sexual conduct and expression of minors if the state has a rational basis to find that such conduct or expression may be harmful. *See Ginsberg v. State of N.Y.*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968). Although 16-17 year olds may be able to legally consent to sexual activity, the General Assembly has recognized that certain persons may be able to abuse a position of authority or influence to obtain sexual contact with minors. We conclude that the legislature had a rational basis to impose a higher standard on persons who have an advantageous position of authority or influence over minors in their care. *Owsley v. Commonwealth*, 743 S.W.2d 408, 410 (Ky. App. 1988).

Stinson also asserts that KRS 510.110(1)(d) is overbroad because it imposes criminal liability without requiring that a jury find the defendant used his or her position of authority or special trust to impose sexual contact on the minor. However, the statute specifically applies to a person who occupies a position of authority or special trust to a minor and who obtains sexual contact with a minor who *"with whom he or she comes into contact as a result of that position"* (Emphasis added). The focus of the statute is not necessarily on the defendant's *use* of his or her position of authority or special trust to obtain sexual contact with a minor, but rather on the fact that the sexual contact occurred while the person occupied that position of authority or special trust with respect to the minor. Since the statute addresses this narrow issue, we cannot find that it needlessly prohibits

or restricts constitutionally protected activities or invites enforcement in an arbitrary manner. *State Bd. for Elementary and Secondary Educ. v. Howard*, 834 S.W.2d 657, 661 (Ky. 1992).

Finally, Stinson argues that the trial court erred by rejecting his proposed jury instruction, finding that lack of consent is not an element of the offense of first-degree sexual abuse in this case. He argues that lack of consent is always an element of the offense unless the victim is legally unable to consent to sexual contact. Since the legislature has not specifically provided that 16-17 year olds are unable to consent to sexual contact from a person in a position of authority or special trust over them, Stinson maintains that the Commonwealth bears the burden of proving that the victim did not consent to the contact.

The Commonwealth responds that KRS 510.110(1)(d) renders an otherwise capable 16-17 year old child incapable of consent in certain situations when a person exercises influence over the child. However, this interpretation is not entirely consistent with the wording of the statute or the other portions of KRS Chapter 510. Indeed, KRS 510.020(1) specifically provides that "[w]hether or not specifically stated, it is an element of every offense defined in this chapter that the sexual act was committed without consent of the victim."

KRS 510.020(3) further specifies that,

> A person is deemed incapable of consent when he or she is:
> (a) Less than sixteen (16) years old;
> (b) Mentally retarded or suffers from a mental illness;
> (c) Mentally incapacitated;
> (d) Physically helpless; or

> (e) Under the care or custody of a state or local agency pursuant to court order and the actor is employed by or working on behalf of the state or local agency.

Similarly, KRS 510.110(1)(b) sets out alternative elements of the offense of first-degree sexual abuse, providing that a person is guilty of the offense when "[h]e or she subjects another person to sexual contact who is incapable of consent because he or she: 1. Is physically helpless; 2. Is less than twelve (12) years old; or 3. Is mentally incapacitated; . . ." *See also*, KRS 510.040(1)(b) (first-degree rape), KRS 510.060(1)(a) (third-degree rape), KRS 510.070(1)(b) (first-degree sodomy), KRS 510.090(1)(a) (third-degree sodomy), and KRS 510.120(1)(a) (second-degree sexual abuse).

Given this language used repeatedly throughout KRS Chapter 510, we agree with Stinson that legislature has specifically set out the classes of minors who are unable to consent to sexual contact. Consequently, the Commonwealth's reading of KRS 510.110(1)(d) would require this Court to re-write the statute to include a new class of minors who are incapable of consenting to sexual contact. We are not at liberty to add or subtract from the legislative enactment or discover meaning not reasonably ascertainable from the language used in the statute. *Commonwealth v. Frodge*, 962 S.W.2d 864, 866 (Ky. 1998). Thus, it would appear that lack of consent remains an element of the offense under KRS 510.110(1)(d).

We need not reach this result, however, because the wording of KRS 510.110(1)(d) implicitly excludes lack of consent as an element of the offense in

this situation. As noted above, the position of authority or special trust component of the offense is directed at individuals who occupy a position of authority or special trust with respect to a minor. Given the special nature of the relationship between a minor and a person who occupies a position of authority or special trust in such situations, the statute creates a presumption that any sort of sexual contact between such persons is inherently coercive.

Consequently, KRS 510.110(1)(d) prohibits any person who occupies such a position of authority or special trust from engaging in sexual contact with minors in his or her care. Any sexual contact between such persons is presumed to be non-consensual. Moreover, we conclude that this presumption is not rebuttable. Thus, the element of lack of consent is not at issue under the facts presented in this case. Therefore, the trial court properly rejected Stinson's proposed instruction.

Accordingly, the judgment of conviction by the Madison Circuit Court is affirmed.

ALL CONCUR.

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