

IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio, : Case No. 09-1572
 :
 Appellant, :
 :
 v. : On Appeal from the
 : Seneca County Court of Appeals,
 : Third Appellate District
 Kiel A. Henry, :
 : Court of Appeals Case No. 13-08-10
 Appellee. :

MEMORANDUM IN SUPPORT ON BEHALF OF AMICUS,
 THE OHIO PROSECUTING ATTORNEYS ASSOCIATION

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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION

In this case, the Court of Appeals for Seneca County reversed a conviction for gross sexual imposition by force under R.C.

2907.05(A)(1). The court held that force was not proven, because, among other reasons, the victim physically resisted the offender.

Under R.C. 2907.05(D), the victim's physical resistance is generally immaterial to a prosecution for gross sexual imposition, but in any of the 17 counties covered by the Third Appellate District, trial courts are cautioned to limit the scope of the statute to exclude instances where an offender employs slight physical force and the victim vigorously, but unsuccessfully, resists.

The elements of the relevant section of the gross sexual imposition statute include sexual contact and that the offender "purposely compelled the victim to submit by force or the threat of force." R.C. 2907.05(A)(1). Force is statutorily defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). This Court has

held, in the context of the rape statute, that the force element should be read as “requiring only that minimal force or threat of force be used” in the commission of the offense. *State v. Eskridge* (1998), 38 Ohio St.3d 56, 58, 526 N.E.2d 304.

The common law required proof of resistance for a prosecution for sexual assault. *State v. Schwab* (1924), 109 Ohio St. 532, 143 N.E.2d 29. Currently the element of force implies non-consent or resistance, and places the primary focus upon the conduct of the offender. Model Penal Code, Section 213.1, comment, at 301-306. The decision of the Third Appellate District in this case, as well as its decision in *State v. Euton*, 3rd Dist. No. 2-06-35, 2007-Ohio-6704, turns the common law requirement of resistance on its head.

A struggling victim, the court of appeals reasoned, continues to exercise her will. If the force used against her does not end her struggle, but only circumnavigates it, the force must not have been sufficient to overcome her will, and there is no force. Decision at ¶31.

The holding of the court of appeals that the resistance of the victim is an indicator of the force used by the offender is contrary to

public policy. Because the element of force implies a lack of consent, vigorous physical resistance cannot negate a finding of force. The holding creates a disincentive in the Third Appellate District for victims to physically resist physical, but non-violent, sexual assaults. Victims are excluded from what protection might be afforded from the statute simply because they resisted the offenders. That a victim of a sex offense should resist has been an integral part of Ohio jurisprudence from the common law. *Smith v. State* (1861), 12 Ohio St. 466, 470. The court of appeals' use of a balancing analysis involving proof of the conduct of both the accused and the victim to determine the element of physical force in this case is also not an isolated mistake; according to the dissent, it represents a pattern of mishandling sexual assault appeals in the Third Appellate District. Decision at ¶45.

To correct this problem, this Court must grant jurisdiction to hear this case and review the erroneous decision of the Third District Court of Appeals.

INTEREST OF AMICUS CURIAE

Amicus curiae, the Ohio Prosecuting Attorneys Association, is an organization of the elected Prosecuting Attorneys of this State. Its members are charged with the responsibility of bringing all criminal actions in this state. In this action, the Association seeks to advance the interest of the state by establishing that its gross sexual imposition statute properly includes offenses that are bravely resisted.

The outcome of the current litigation is therefore a matter of great interest to all of Ohio's eighty-eight prosecuting attorneys, and thereby the Association.

STATEMENT OF THE CASE AND FACTS

Appellant Henry is a relatively large, athletic college student, a member of the college wrestling team, who did relatively very little to forcibly perpetrate the sexual contact in this case, because the victim was half asleep and initially mistook him for her boyfriend. The victim is a petite woman, who, in addition to repeated saying "no" and removing Henry's hand, upon fully comprehending the circumstances, employed heroic measures to expel him from her bed.

The court of appeals held that her post-sexual-contact physical resistance was an indicator of whether the defendant used force. In short, it held that the offender did not use force, because she physically resisted far more than the force employed in his advances.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I : The offense of gross sexual imposition under R.C. 2907.05(A)(1) involving force by physical coercion may be committed despite the fact that the will of the victim was not overcome.

The offense of gross sexual imposition under R.C. 2907.05(A)(1) is defined as follows: "(A) No person shall have sexual contact with another, not the spouse of the offender *** when any of the following applies: (1) The offender purposely compels the other person, or other persons, to submit by force or threat of force." The term "force" is defined in R.C. 2901.01(A)(1) as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." This Court has recognized in the context of child sex abuse involving a parent or authority figure, that "[f]orce need not be overt

and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established." *State v. Eskridge* (1998), 38 Ohio St.3d 56, 58, 526 N.E.2d 304.

This requirement of overcoming the victim's will should not apply in cases where the sex offense is accomplished by physical force not involving fear or duress. In cases of pure physical coercion, the act may be accomplished irrespective of the offenders's inability to break the victim's will. The victim may vigorously resist, and yet the element of force would obviously be met.

Here, the court of appeals applied the requirement that for force to be present, there had to be evidence that the victim's will was overcome. This case was not one where the sexual contact was accomplished by means of fear or duress, however. Instead, the offender accomplished the offense with minimal force, due to the victim's drowsiness and misapprehension of the offender's identity.

Force was demonstrated instead by her contemporaneous verbal objection to the offender's conduct and her physical removal of his

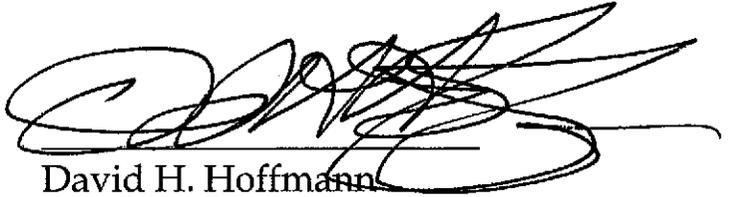
hand from her person. Under these circumstances, any evidence of resistance, i.e., that her will was not overcome, was irrelevant to the issue of whether force was used. For this reason, the court of appeals improperly applied the rule in *State v. Eskridge* (1998), 38 Ohio St.3d 56, 58, 526 N.E.2d 304.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. Amicus requests that this court grant jurisdiction and allow this case so that the important issue presented in this case will be reviewed on the merits.

Respectfully submitted,

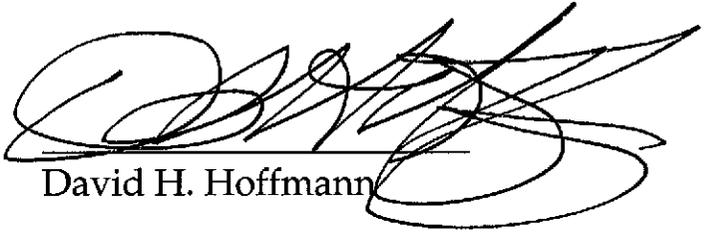
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PROOF OF SERVICE

I certify that a copy of the above has been sent by ordinary U.S. mail, postage prepaid, to James Davey, Assistant Prosecuting Attorney, at his address of 71 South Washington Street, Suite 1204, Tiffin, Ohio 44883, and to Javier Armengau, Counsel for the Appellee, at his address of 857 S. High Street, Columbus, Ohio 43206, on August 28, 2009.



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