

IN THE SUPREME COURT OF OHIO

Case No. 2009-0477

ORIGINAL

STATE OF OHIO :
Appellee :
-vs- :
THOMAS DUNLAP :
Appellant :

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 91165

REPLY BRIEF OF APPELLANT THOMAS DUNLAP

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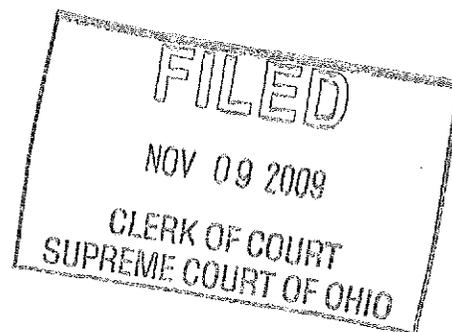


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SUMMARY OF ARGUMENT

Proposition of Law I in this case addresses the question of whether there is a mens rea attendant to the offense of gross sexual imposition against a child under 13. In his Appellant's Merits Brief, Mr. Dunlap argued that the Eighth District Court of Appeals incorrectly held that this was a strict liability offense. Mr. Dunlap argued that "sexual contact" consisted of a "reckless" touching of an erogenous zone, in addition to an overall "purpose" of sexual gratification.

Despite having argued previously that the Eighth District correctly held that gross sexual imposition against a child under 13 was a strict liability offense,¹ the State of Ohio now contends that the Eighth District was wrong. According to the State's revised position, the term "purpose of sexual gratification" (which is part of the definition of "sexual contact") not only describes an overall purpose but also supplies a mens rea of "purposely" for the specific act of touching the erogenous zone.

Because Mr. Dunlap has already examined the Eighth District's strict-liability position in his merits brief, and because the State concedes the error of the Eighth District, the following reply focuses on the competing positions set forth by the State and Mr. Dunlap. Mr. Dunlap disagrees with the State that the mens rea for sexual contact is "purposely" in light of the fact that the term "purpose" appears in a separate clause of the definition of "sexual contact." Moreover, even if the State is correct, then Mr. Dunlap still received a structurally flawed trial in light of the misunderstanding that the offense was one of strict liability -- a misunderstanding that would have begun in the grand jury and continued through the final verdict.

¹ See, e.g., State's Memorandum in Opposition to Jurisdiction, filed April 19, 2009, at 5-6.

After examining the State’s position, Mr. Dunlap demonstrates why he has correctly concluded that the mens rea for sexual contact is one of recklessness. As a result, Mr. Dunlap should receive a new trial on the two counts of gross sexual imposition.²

ARGUMENT

Proposition of Law I: Gross sexual imposition against a child under 13 is not a strict liability offense. The act of sexual contact must be recklessly performed.

This case concerns the interpretation of R.C. 2907.01(B), which defines “sexual contact:”

“Sexual contact” means any touching of an erogenous zone of another, including without limitation, the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the *purpose* of sexually arousing or gratifying either person.

(emphasis added).

The State’s Position: The touching of the erogenous zone must be done purposely.

The State attempts to bootstrap a “purposely” mens rea for the “touching of an erogenous zone” by seizing on the term “purpose of sexually arousing or gratifying . . .” which appears at the very end of the definition. The State’s argument incorrectly applies the term “purpose” in the last clause of R.C. 2907.01(B) to the first clause of R.C. 2907.01(B).

When two clauses are discreet from one another, this Court has repeatedly recognized that the mens rea attendant to one clause will not be applied to another. Thus, in the weapons-under-disability case of *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325, this Court held that the term “knowingly” modified the phrase “acquire, have, carry or use any firearm or dangerous

² Mr. Dunlap is seeking a new trial on the two counts of gross sexual imposition; Proposition of Law I does not affect the conviction for disseminating obscene materials to a juvenile. The relief in this case would not include a resentencing on the dissemination count, in which sixteen months of imprisonment was imposed with the concurrent two-year sentences imposed on the gross sexual imposition charges (total sentence of two years). In light of the amount of time that has passed, any effect on the sentencing is moot – Mr. Dunlap will have completed the entire two year sentence for all counts prior to the time this case is decided.

ordnance,” but did not modify the separate clause “under indictment” for which no mens rea was specified. *Id.*, at pars. 13-14. Instead this Court held that the circumstance of being under indictment must be one that is committed “recklessly,” the default mens rea, or else be a circumstance to which strict liability attaches. *Id.*, at par. 15. Accord, *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121; *State v. Wac* (1981), 68 Ohio St.2d 84.³ If the State were correct that the term “purpose” can be bootstrapped into the remainder of R.C. 2907.01(B), then *Clay* and the cases on which it relies have been incorrectly decided.

In addition, the State would open a Pandora’s Box of heightened mens rea for other offenses where the term “purpose” appears in one clause of the statutory section or division but not in another. For example, aggravated burglary, R.C. 2911.11(A)(1) prohibits, inter alia, trespassing by force, stealth or deception into an occupied structure when another person is present “with *purpose* to commit . . . any criminal offense” and in which the offender inflicts physical harm upon another. *Id.* (emphasis added). Under the State’s interpretation, the term “purpose” must modify all the other unmodified elements – including the element of presence of another and the element of inflicting physical harm. Thus, the burglar who breaks into the house and bowls over an occupant in the course of escaping will not be convicted of aggravated burglary if the jury concludes that he was merely reckless in his awareness that someone would be home (as opposed to intending that someone be home) or merely reckless in hurting the victim while escaping (as opposed to having hurt the victim intentionally). R.C. 2901.22(A).

³ *Maxwell* and *Wac* ultimately concluded that the discrete clauses in those statutes were strict-liability elements of those respective crimes. As discussed in Appellant’s merits brief, strict liability would be inappropriate with respect to the touching of an erogenous zone, which can occur accidentally. “[T]ouching an erogenous zone” is an element of every form of gross sexual imposition, R.C. 2907.05, and every form of sexual imposition, R.C. 2907.06. If this element is one of strict liability, then a host of inadvertent touchings would become criminal, whether

Finally, the State’s argument that the mens rea is “purposely” underscores the structural error in this case. The grand jury in this case must be presumed to have followed the law of the Eighth District. That law, as set forth at page two of the Opinion Below, makes clear that, in Cuyahoga County, the gross sexual imposition counts were considered to be strict liability offenses. This alone denied Mr. Dunlap his constitutional right to an indictment in which the grand jury considered all the elements of the offense. Art. I, Sec. 10, Ohio Constitution; *State v. Headley* (1983), 6 Ohio St. 475. On this basis alone, the convictions should be reversed.

However, the error did not end at the time of indictment; it pervaded the trial. The jury was instructed on the element of “sexual contact” by merely having the statutory definition read to them, i.e., “‘Sexual contact’ means any touching of an erogenous zone . . . “ (T. 325-26). If the State is correct, then the jury should have been told that sexual contact means any **purposeful** touching of an erogenous zone. Thus, under the State’s interpretation, the error is even more pronounced than under the position of Mr. Dunlap – who believes the jury should have been instructed that: “‘Sexual contact’ means any reckless touching of an erogenous zone.”

Proposition of Law I: Appropriately draws the balance at “recklessly”

Proposition of Law I correctly draws the balance by employing the “reckless” default mens rea. R.C. 2901.21 – R.C. 2901.22. The Proposition is consistent with this Court’s prior caselaw, see *supra*, and avoids the unreasonable consequences of the State’s “purposely” construct.

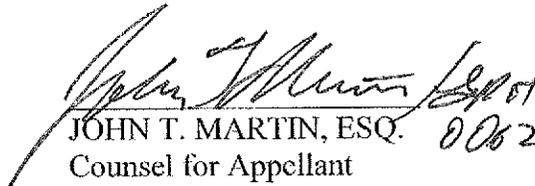
committed between adolescents or between adults. The General Assembly is presumed not to intend such unreasonable results.

At the same time, the failure to include “reckless” requires reversal of the convictions.
State v. Colon, 118 Ohio St.3d 26, 2008-Ohio-1624, clarified, 119 Ohio St.3d 204, 2008-Ohio-3748.

CONCLUSION

Wherefore, the convictions for gross sexual imposition should be reversed.

Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief was served upon WILLIAM D. MASON, ESQ.,
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44113 on this 9th day of November, 2009.


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