

ORIGINAL

IN THE SUPREME COURT OF OHIO

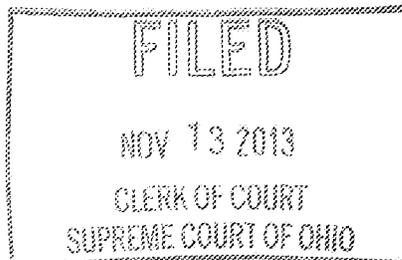
STATE OF OHIO,)	CASE NO. 2013-1619
)	
Plaintiff/Appellant,)	
)	ON APPEAL FROM THE CUYAHOGA
v.)	COUNTY COURT OF APPEALS
)	EIGHTH APPELLATE DISTRICT
MATTHEW MOLE)	
)	COURT OF APPEALS
Defendant/Appellee)	CASE NO. CA98900

**MEMORANDUM OF APPELLEE
MATTHEW MOLE IN RESPONSE TO MEMORANDUM IN SUPPORT OF
JURISDICTION**

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MEMORANDUM IN RESPONSE

I. PROCEDURAL / FACTUAL BACKGROUND

Appellee Matthew Mole (“Appellee”) was cooperative with police during his December 19, 2011 arrest with regard to this case. On January 13, 2012, a Cuyahoga County Grand Jury filed a two-count indictment against Appellee. Count One of the indictment alleges unlawful sexual conduct with a minor in contravention of R.C. § 2907.04(A), a felony of the third degree. Count Two of the indictment alleges sexual battery, a strict liability offense, in contravention of R.C. § 2907.03(A)(13), also a felony of the third degree. R.C. § 2907.03(A)(13) states:

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(13) The other person is a minor, the offender is a peace officer, and the offender is more than two years older than the other person.

Appellee entered a plea of not guilty at his January 30, 2012 arraignment and challenged the constitutionality of R.C. § 2907.03(A)(13) throughout the lower court proceedings of this case.

Factually this case involves contact on a gay mobile phone app initiated by a 14 year old boy posing as an experienced 18 year old man who repeatedly advised Appellee that he was 18 years old. As a result of the persistence of the 14 year old, Appellee accepted the boy’s invitation to his home never realizing the boy was less than 18 years of age. Neither the 14 year old involved in this case nor the

officers involved in Appellee's arrest was aware that Appellee was a police officer until after his arrest when his badge was discovered in his truck.

On July 13, 2012, a mistrial was declared with regard to Count One of the indictment (an allegation of unlawful sexual conduct with a minor) upon which the jury could not reach a unanimous verdict after splitting eight (8) to four (4) in favor of a not guilty verdict. On July 16, 2012, Appellee was found guilty of Count Two of the indictment (sexual battery in contravention of R.C. § 2907.03(A)(13)) at the conclusion of his bench trial on this count. Appellee maintained his challenge to the constitutionality of R.C. § 2907.03(A)(13) throughout the pendency of the trial court case.

On August 27, 2012, Appellee was found to be a Tier III Sex Offender, which requires registration every 90 days for life. Appellee was sentenced on that same date to a two-year term of incarceration. On August 30, 2012, Appellant's Motion for a Stay of Execution of Sentence and / or an Appeal Bond was denied by the trial court.

On July 18, 2013, Appellant's conviction was reversed by the Ohio Court of Appeals, Eighth Appellate District, in a plurality opinion that finds R.C. § 2907.03(A)(13) unconstitutional on two (2) separate bases. One (1) week later Appellant was released from prison after being incarcerated for over ten (10) months.

II. THE REVERSAL OF APPELLANT'S CONVICTION BY THE OHIO COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

In finding R.C. § 2907.03(A)(13) unconstitutional for failure to pass a rational-basis test, the Ohio Court of Appeals, Eighth Appellate District, held in the majority opinion of *State v. Mole*, 2013-Ohio-3131, 98900, ¶¶ 31 - ¶ 38, as follows:

{¶31} The legislature's intent in originally enacting R.C. 2907.03 was to deter sexual conduct "in a variety of situations where the offender takes unconscionable advantage of the victim." *State v. Funk*, 10th Dist. No. 05AP-230, 2006-Ohio-2068 at ¶ 97, quoting 1974 Committee Comment to H.B. 511. The legislature has subsequently amended the sexual battery statute to add categories where an offender has authority or control over the intended victim. The problem with R.C. 2907.03(A)(13) is that it stands alone among the subsections in that it requires no intent on behalf of the offender and no relationship or occupational connection between the offender and the victim.

{¶ 32} This appears to be a case of first impression in Ohio. Moreover, we were unable to find a similar law in any other state in the nation. In looking at other equal protection challenges to Ohio's sexual battery statute, the Ninth District Court of Appeals upheld such a challenge to R.C. 2907.03(A)(7) in *State v. Shipley*, 9th Dist. No. 03CA008275, **2004-Ohio-434**.

{¶ 33} In *Shipley*, the court found the statute was "rationally related to its intended purpose of preventing teachers from taking unconscionable advantage of students by using their undue influence over the students in order to pursue sexual relationships." *Id.* at ¶ 81. The court noted the connection between the offense and the occupation of the offender, i.e., that it is unlawful when teachers use their undue influence over students to pursue sexual relationships, and held that the state had a legitimate interest in protecting

minors from their teachers who might take advantage of them. *Id.*

{¶ 34} Likewise, in this case, the state might have a legitimate interest in protecting minors from police officers who use their profession to pursue inappropriate sexual relationships. But there exists no occupational connection or relationship requirement in R.C. 2907.03(A)(13). We agree with Mole that one's occupation as a peace officer alone, without more, does not provide a person with an "unconscionable advantage" over a minor.

{¶ 35} Consequently, because the state's method or means of achieving its interest is not rational, R.C. 2907.03(A)(13) fails the second prong of the rational-basis test.

{¶ 36} In sum, while the state may have a legitimate interest in protecting minors from those who might use their undue influence over them in order to pursue sexual relationships, Mole has been able to show that R.C. 2907.03(A)(13) bears no rational relationship to a legitimate government interest.

{¶ 37} Therefore, we find that R.C. 2907.03(A)(13) violates the Equal Protection Clauses of the Ohio and United States constitutions. The trial court erred in denying Mole's motion to dismiss.

{¶ 38} The first assignment of error is sustained.

The above-quoted majority decision was joined in a concurring opinion that focused on the irrationality of R.C. 2907.03(A)(13), but for reasons different from those cited by the majority. The concurring opinion in *State v. Mole*, 2013-Ohio-3131, 98900, ¶ 42 - ¶ 48, held as follows:

{¶ 42} I concur with the disposition of the appeal, but do so for reasons different than those offered by the majority opinion.

{¶ 43} Although the statutory definition of a "peace officer" is seemingly broad, the legislature was acting within its prerogative when so defining that term. The legislature could rationally find that any person imbued with police authority, regardless of that person's specific duties, fell within a class of persons who could abuse a position, particularly in relation to minors. In any event, the majority's concerns regarding the overbreadth of the peace officer classification are not present in this case because Mole was, in fact, a police officer. So concerns about whether the definition of a peace officer is overbroad because it includes more esoteric positions like "forest officer" and "department of taxation investigator" is immaterial.

{¶ 44} I do agree with the majority that Mole was prosecuted under R.C. 2907.03(A)(13) for conduct that the statute irrationally criminalizes. To be sure, the right of adults to engage in private sexual conduct in the exercise of their liberty does not apply to minors or "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." *Lawrence v. Texas*, **539 U.S. 558**, 578, **123 S.Ct. 2472**, 156 L.Ed.2d 508 (2003). However, the statute arbitrarily prohibits any form of sexual conduct between a peace officer and a minor without regard to whether the offender's position as a peace officer was a motivating factor for either the offender or the victim.

{¶ 45} The fundamental premise behind R.C. 2907.03(A)(13) and, indeed, the other divisions of R.C. 2907.03, is to prevent those in positions of authority from using their authority to coerce, compel, or force capitulation to that authority. Thus, the statute singles out teachers, coaches, mental health professionals, prison staff, clergy, scout leaders, and, of course, police officers. It requires no citation to authority to recognize

that the common feature among these classes of offenders is that they all have the potential to abuse their authority. In the case of police officers, the potential to force a victim's capitulation to sexual advances in exchange for favorable police treatment is manifest.

{¶ 46} But the goal of protecting minors from capitulating to sexual coercion brought about by abuses of police authority cannot be a factor when the minor is unaware that the other person is a police officer. Crucial to this case is the uncontested fact that Mole's position as a police officer had nothing to do with the sexual activity he engaged in with the victim: Mole did not tell the victim he was a police officer and the victim testified that he had no idea that Mole was a police officer. The evil to be prevented by R.C. 2907.03(A)(13), the misuse of police authority to compel or coerce sexual conduct, was simply not present in this case.

{¶ 47} Apart from the statute criminalizing conduct that it was not designed to prevent, the age distinction employed by the statute is arbitrary. The age requirement that the offender be "more than two years older than the other person" seemingly contradicts the stated intent of the statute. While it seems unlikely that a person under the age of 20 could be named a peace officer, it is possible. So the statute rather contradictorily does not criminalize sexual conduct between a peace officer and a minor who is two years younger or less than the peace officer, even if the peace officer actually did intend to coerce the victim's capitulation through the authority of the office.

{¶ 48} Mole's sexual conduct with a minor was reckless. But he was not found guilty of that offense under R.C. 2907.04. Instead, he was convicted under a statute that in some circumstances criminalizes conduct that it did not intend to prevent, and yet in other circumstances allows conduct that it intended to criminalize. Because Mole's conviction was not obtained

to punish any ill sought to be prevented by the statute,
It is unconstitutional.

III. Law and Argument in Opposition of This Honorable Court Granting Jurisdiction

Appellee respectfully argues against this Honorable Court granting jurisdiction of this case based on the following factors. First, this is a self-acknowledged case of first impression. See *State v. Mole*, 2013-Ohio-3131, 98900 ¶32. Given this dearth of appellate review by lower courts, it seems that review by this Honorable Court would be premature and is unwarranted at this time. There are no jurisdictional conflicts for this Court to resolve. Appellee respectfully suggests that the lack of review of the issue presented in this case, to-wit: the constitutionality of R.C. §2907.03(A)(13), undermines the perception that this case involves a substantial constitutional question. Put another way, if this issue were substantial, why have no other decisions addressed it?

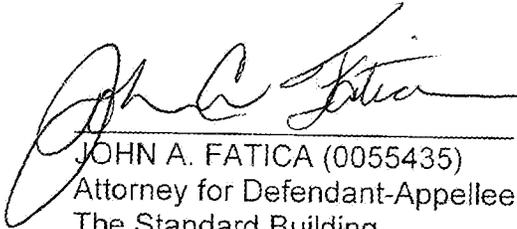
Second, the opinion of the of the Ohio Court of Appeals, Eighty Appellate District, in *State v. Mole*, 2013-Ohio-3131, 98900, is a plurality opinion that contains a majority opinion, and concurring opinion and a dissenting opinion. As such, the use of this case as precedent seems severely limited. This limitation as precedent is heightened by what Appellee respectfully suggests are a highly unique set of factual circumstances involving a persistent 14 year old boy posing as an 18 year old adult and an off-duty police officer not known by the 14 year old as being a police officer.

Third, the cumulative affect of the first two (2) factors further limit the perception of this case as being of great public or general interest. The lack of review, three (3) separate opinions by the lower court's three (3) judge panel and unique factual

circumstances combine to undermine any perception that this case is of great public or general interest.

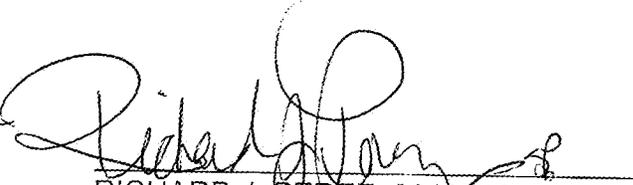
For all of the above reasons, this Court should decline jurisdiction in this matter.

Respectfully submitted,



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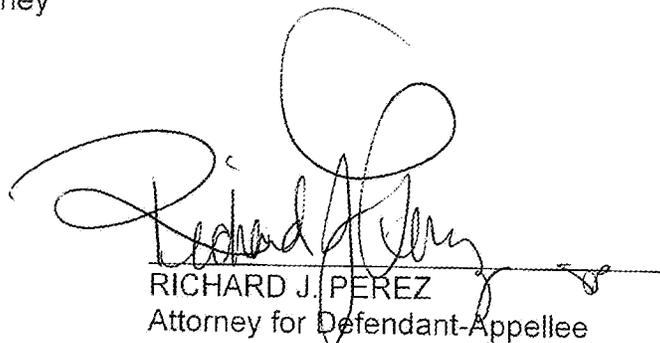


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IV Certificate of Service

A copy of the foregoing was sent by regular U.S. mail this 13th day of November, 2013, to:

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