

ORIGINAL

NO. 2013-1619

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR  
CUYAHOGA COUNTY, OHIO  
NO. 98900

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STATE OF OHIO,  
Plaintiff-Appellant

-vs-

MATTHEW MOLE,  
Defendant-Appellant

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**REPLY BRIEF OF APPELLANT**

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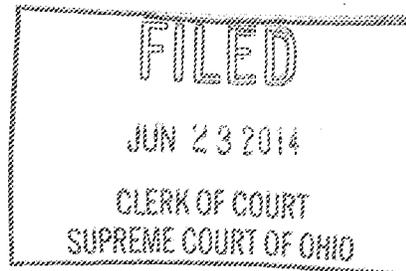
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## LAW AND ARGUMENT

### PROPOSITION OF LAW: R.C. 2907.03(A)(13), WHICH CRIMINALIZES SEXUAL CONDUCT BETWEEN PEACE OFFICERS AND CHILDREN, ON ITS FACE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The State does not misconstrue Mole's burden of establishing, under a rational basis and facial challenge, that R.C. 2907.03(A)(13) is invalid under all circumstances. The fact that the Eighth District did not expressly hold that R.C. 2907.03(A)(13) unconstitutional under all circumstances is indicative that Mole has failed to satisfy his own burden of proving R.C. 2907.03(A)(13) is invalid on its face. Mole again fails to meet this burden. Merely because the Eighth District cited the correct standard does not mean it was correctly applied (Appellee's Brief, pg. 5 citing *State v. Mole*, 8th Dist. Cuyahoga No. 98900, 2013-Ohio-3131, 994 N.E.2d 482 at ¶12. It is still incumbent that Mole must demonstrate that the statute is invalid in toto. *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) and reviewing courts must be cautious when striking down a statute as invalid on its face because facial invalidation should be used "sparingly and only as a last resort." *Natl. Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998).

Mole maintains that R.C. 2907.03(A)(13) violates the Equal Protection Clause of the United States Constitution and of the Ohio Constitution. (Appellee's Brief, pg. 3). Mole argues that R.C. 2907.03(A)(13) lacks rational basis because peace officers should not be punished based on their status as peace officers alone. (Appellee's Brief, pg. 6). Mole's facial challenge, would effectively render R.C. 2907.03(A)(13) totally inoperative under all circumstances. *Yajnik v. Akron Dept. of Health, Housing Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, at ¶14.

Mole asserts that he is attacking R.C. 2907.03(A)(13) on its face because the law, “Cannot survive a challenge on any set of facts because it will always violates the defendant peace officer’s equal protection rights under the law.” (Appellee’s Brief, pg. 7). Mole would have this Court conclude that R.C. 2907.03(A)(13) cannot be constitutionally utilized to punish Mole’s conduct, as a 36 year old man, for engaging in sexual conduct with a 14-year old boy, simply because he did not tell the 14-year old that he was a police officer. Mole’s equal protection argument is premised upon an argument that he be treated the same as an ordinary citizen; however, no adult in Ohio can engage in sexual conduct with a 14-year old.

Mole maintains that it is irrational to include all peace officer categories under R.C. 2907.03(A)(13) and that it is irrational to criminalize sexual conduct between adult peace officers and children, where the child does not know that the defendant is a peace officer. But merely because the statute in which Mole was convicted under was placed under the sexual battery section, does not mandate a requirement that there be an occupational relationship between the defendant and the victim.

Other statutes provide law enforcement with additional protections, regardless of whether their status as a law enforcement officer is known. For example, R.C. 2903.11(D) provides enhanced penalties if the victim is a peace officer. Knowledge that the victim of the felonious assault is a peace officer is not necessary to invoke an enhanced penalty. See *State v. Carter*, 9<sup>th</sup> Dist. Summit No. 21474, 2003-Ohio-5042, ¶10-12, *State v. Williams*, 8<sup>th</sup> Dist. Cuyahoga No. 52262, 1987 WL 11975 (June 4, 1987). This statute would apply to all peace officers including those that Mole deems “virtually invisible to most people...” Appellee’s Brief, pg. 17.

There remains a rational reasons to prohibit all peace officers from engaging in sexual conduct with children. Mole’s argument that it is irrational to treat peace officers differently from the

ordinary citizen, when it comes to sexual conduct with children, ignores the responsibility and perception that comes with having a badge. This Court has recognized that “[l]aw enforcement officials carry upon their shoulders the cloak of authority of the state. For them to command the respect of the public, it is necessary then for these officers even when off duty to comport themselves in a manner that brings credit, not disrespect, upon their department.” *Jones v. Franklin County Sheriff*, 52 Ohio St.3d 40 at 43, 555 N.E.2d 940 (1990). With that comes the principle that police officers are held to a higher standard than the general public. *Id.*

Even retired peace officers could violate that public trust by utilizing specialized knowledge to prey upon children. But see *State v. Bonness*, 8<sup>th</sup> Dist. Cuyahoga No. 96557, 2012-Ohio-474, ¶3-4, 21-22 and *State v. Bonness*, 8<sup>th</sup> Dist. Cuyahoga No. 99129, 2013-Ohio-2699 (Bonness was a retired peace officer who was caught in a sting for answering to an anonymous post of a fictitious father and daughter “looking for the right person in the Cleveland area” and had agreed to meet with the fictitious 12-year-old to engage in a sexual encounter; however, Bonness argued that as a retired officer he should not be held to the same standard as an currently-serving police officer – the Eighth District agreed).

Although, Mole claims, as the standard requires, that R.C. 2907.03(A)(13) has no valid application, his argument is flawed because he cannot negate every conceivable basis that might support R.C. 2907.03(A)(13), instead he focuses on particular instances which Mole deems irrational, such as a factual situation where a peace officer does not hold himself out to be a peace officer to a child. (Appellee’s Brief, pgs. 7-12).

Mole’s flawed analysis continues as he argues “[t]here is no rational basis to punish a peace officer for engaging in sexual conduct with someone who is at least sixteen years of age, the Ohio age of consent, where the statute does not require the officer to have used his or her

position of authority to obtain consent or require that the alleged victim know the offender is a peace officer...” (Appellee’s Brief, pg. 12). This argument does not negate an instance where the victim is less than sixteen years of age, like Mole’s victim in this case. Nor does Mole attempt to argue that the statute would be unconstitutional under circumstances in which the victim knows that the offender is a peace officer. To that end Mole does not attempt to negate every conceivable basis for which R.C. 2907.03(A)(13) and he agrees that, “[i]t is undeniable that peace officers who use their position of authority to coerce another to engage in sexual conduct should be criminally punished.” Appellee’s Brief, pg. 16.<sup>1</sup>

Mole’s concession that a statute like R.C. 2907.03(A)(13) could be validly applied where a peace officers abuses his position of authority to coerce a sexual encounter demonstrates that Mole cannot meet the burden of proving that R.C. 2907.03(A)(13) has no valid applications. As a consequences, Mole cannot demonstrate that R.C. 2907.03(A)(13) is invalid on its face.

Mole attempts to argue that the statute would be facially invalid under all circumstances because the State would not have to prove, “(1) that the offender was a law enforcement officer, who has a special relationship with the public; (2) that the offender knew, or was reckless or even negligent in determining the age of the victim; (3) that the victim knew the offender was a peace officer or (4) there was any connection between the offender’s occupation and the offense.”<sup>2</sup> However, it is within the General Assembly’s authority to define criminal conduct and determine criminal conduct. *State v. Bonello*, 3 Ohio St.3d 365, 670 (1981). What the prosecutor needs to prove to establish a violation of R.C. 2907.03(A)(13), should not be

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<sup>1</sup> Mole’s argument that R.C. 2907.03(A)(6) satisfies that legislative goal fails because that provision is not focused on children and is only focused on those who are in custody.

<sup>2</sup> The State would note Mole also sought dismissal because the indictment failed to include a mens rea for R.C. 2907.03(A)(13). This assignment of error relating to the defective indictment was not addressed below due to the resolution.

confused with the instances in which R.C. 2907.03(A)(13) criminalizes conduct that Mole does not take issue with. The fact that R.C. 2907.03(A)(13) can prohibit a peace officer, who may use the officer's own position of authority, to coerce sexual conduct with a minor, shows that R.C. 2907.03(A)(13) can survive a facial challenge.

Despite Mole's arguments, R.C. 2907.03(A)(13) does have a rational basis as detailed in the State's merit brief.

The public policy goal of limiting who can engage in sexual conduct with any child under the age of 18 (even if the child is of the age of consent) is not confined to the facts and circumstances in this case. For example, under R.C. 2903.11(B)(3), regardless of consent, a person who is a carrier of a virus that causes acquired immunodeficiency syndrome would commit the crime of felonious assault if the person engages in sexual conduct with a 17 year old, while a person who is not a carrier would not be guilty of the offense. At least one appellate court rejected the argument that the statute violates the Equal Protection Clause. See *State v. Gonzalez*, 193 Ohio App.3d 385, 2011-Ohio-1542, 952 N.E.2d 502, ¶73. While R.C. 2903.11(B)(3) is not subject for review in this case, its public policy goal is evident – protecting children from sexual encounters with a carrier of a virus that causes acquired immunodeficiency syndrome. Notable is that R.C. 2903.11(B)(3) does not require that the victim know that the defendant has the virus, and even if the 17-year old victim knew and consented it would still be a crime.

Another example is illustrated in pending legislation which expands certain categories of sexual battery, to include all employees of a school and not just teachers. See 2013 Am. H.B. 241 ([http://www.legislature.state.oh.us/bills.cfm?ID=130\\_HB\\_241](http://www.legislature.state.oh.us/bills.cfm?ID=130_HB_241)). Mole's argument that all offenses under the sexual battery statute must contain some type of "unconscionable advantage"

may lead one to question whether all school employees could exercise “unconscionable advantage” over a student and whether all school employees should be subjected to punishment under the sexual battery statute if the General Assembly enacts the bill. In this case, the focus should not be on R.C. 2907.03(A)(13)’s placement in the sexual battery statute and whether it is appropriately limited to those individuals who could exercise an unconscionable advantage over a child, but whether the crime standing alone survives constitutional scrutiny. In other words, notwithstanding R.C. 2907.03(A)(13)’s placement in the sexual battery statute, is it rational to punish a peace officer for engaging in sexual conduct with a child. For the reasons articulated in the State’s merit brief, the State maintains that R.C. 2907.03(A)(13) is rational due to the dual purpose of protecting children and holding law enforcement officers to a higher standard.

**CONCLUSION**

The State maintains that R.C. 2907.03(A)(13) is facially valid and does not violate the Equal Protection Clause of the United States and Ohio constitutions. Mole has failed to establish that there are no set of circumstance in which R.C. 2907.03(A)(13) would be valid. This decision of the Eighth District should be reversed and this matter remanded to the Eighth District for consideration of the remaining assignments of error.

Respectfully submitted,

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## 2903.11 Felonious assault.

(A) No person shall knowingly do either of the following:

- (1) Cause serious physical harm to another or to another's unborn;
- (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

- (1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;
- (2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;
- (3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D)

(1)

(a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit,

probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

Amended by 129th General Assembly File No. 29, HB 86, §1, eff. 9/30/2011.

Effective Date: 03-23-2000; 08-03-2006; 03-14-2007; 04-04-2007; 2008 HB280 04-07-2009