

135402
Supp by PLAE

State of Michigan
In the Supreme Court

People of the State of Michigan,
Plaintiff-Appellee,

v

Andre Farah Bond,
Defendant-Appellant.

Michigan Supreme Court
No. 135402

Court of Appeals
No. 267679

Lower Court
No. 05-93 FH

Brian L. Mackie (P25745)
Washtenaw County Prosecutor
Attorney for Plaintiff-Appellee
P.O. Box 8645
Ann Arbor, MI 48107
(734) 222-6620

Richard B. Ginsberg (P14018)
Attorney for Defendant-Appellant
P.O. Box 7378
Ann Arbor, MI 48107
(734) 213-0918

Plaintiff-Appellee's Supplemental Brief on Application for Leave to Appeal

Brian L. Mackie (P25745)
Washtenaw County Prosecutor

By: Mark Kneisel (P49034)
Assistant Prosecutor
P.O. Box 8645
Ann Arbor, MI 48107
(734) 222-6620



Counterstatement Identifying the Order Appealed From and Indicating the Relief Sought

The Court has scheduled oral argument on Defendant-Appellant's application for leave to appeal and instructed the parties to "address the interpretation and application of the 'use of authority' language in the criminal sexual conduct statutes, MCL 750.520 *et seq.*" The Court also permitted the filing of this supplemental brief.

The People request that this Court endorse the relief granted by the Court of Appeals, which was the reinstatement of Defendant's CSC-2 conviction with a remand for resentencing. The People request that this Court base that relief on either or both of two rationales. The first rationale is that at the time Defendant sexually assaulted the victim, he used his authority to coerce the victim to submit. The second rationale is that Defendant used his authority to coerce the victim to submit to his sexual contact. The rationales are distinct but not mutually exclusive, and both support the relief requested by the People.

Counterstatement of Question Presented for Review

I. The subsections in the CSC-1 and -2 statutes elevating culpability for those in authority who “used this authority to coerce the victim to submit,” mean exactly what they say and nothing more. They do not require that a victim submit additionally to becoming a sexual actor or submit to a particular sexual act. Does the “use of authority” language in the criminal sexual conduct statutes merely require that a victim submit to a defendant’s authority?

Plaintiff-Appellee answers, “Yes.”

Defendant-Appellant answers, “No.”

The trial court answered, “No.”

The Court of Appeals answered, “Yes.”

II. The current jury instruction superfluously requires that a jury find that a defendant used his authority to coerce a victim to submit to the sexual acts alleged, instead of merely submitting to the defendant’s authority. Should the correct application of the statutory language assign aggravated criminal liability when at the time of a sexual assault an authority figure uses his authority to coerce a victim to submit?

Plaintiff-Appellee answers, “Yes.”

Defendant-Appellant answers, “No.”

The trial court answered, “No.”

The Court of Appeals answered, “Yes.”

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Counterstatement of Material Proceedings and Facts

Plaintiff-Appellee incorporates by reference the recitation of facts found in the opinion of the Court of Appeals and in its Response to Defendant-Appellant's Application for Leave to Appeal.

Argument

Defendant was convicted of Criminal Sexual Conduct – Second Degree, under MCL 750.520c(1)(b)(iii). Subsection (1)(b)(iii) elevates to CSC-2 what would otherwise be a CCS-4 (based on the age of the victim) perpetrated by an actor that “is in a position of authority over the victim and (who) used this authority to coerce the victim to submit.” This subsection has two parts.¹ The first is that a defendant be in a position of authority over the victim and the second is that a defendant use the authority to coerce the victim to submit. It is the interpretation and application of this second part that the Court has instructed the parties to address. (The same statutory language is also used in the CSC-1 statute for victims between the ages of 13 and 16, and in both the CSC-1 and CSC-2 statutes for victims that are mentally incapable. See MCL 750.520b(1)(b)(iii), MCL 750.520b(1)(h)(ii), and MCL 750.520c(1)(h)(ii).)

The first section of this supplemental brief addresses the interpretation of the statutory language. This analysis will also address the genesis of a superfluous requirement that a victim be coerced to submit not merely to a defendant’s authority, but also into submitting to a particular sexual assault. Although this superfluous requirement is usually benign, on our facts it is responsible for the precise misinterpretation to which the trial court, and even the Court of Appeals fell prey.

The second section addresses the proper application of the plain statutory language. Specifically, this point heading will propose a jury instruction that more

¹ *People v Reid*, 233 Mich App 457, 467; 592 NW2d 767 (1999).

faithfully assigns aggravated criminal liability based on the statute's proper meaning.

Because the prosecution successfully convicted Defendant even with an improperly added element, his jury conviction of CSC-2, as reinstated by the Court of Appeals, should stand. Therefore, a denial of Defendant's application for leave to appeal will afford the People the relief sought. Additionally or alternatively, the People request that this Court either summarily rule on the proper application of the plain statutory language and jettison the superfluous requirement, or grant leave to appeal toward that end, while still ultimately affirming Defendant's CSC-2 conviction.

As the interpretation and application of the "use of authority" language in the criminal sexual conduct statutes are at issue, the standard of review throughout is *de novo*.² The standard of review is also *de novo* in analyzing whether Defendant's conduct was indeed proscribed by the statute as properly interpreted and applied.³

² *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

³ *Reid*, 233 Mich App at 466.

I. The subsections in the CSC-1 and -2 statutes elevating culpability for those in authority who “used this authority to coerce the victim to submit,” mean exactly what they say and nothing more. They do not require that a victim submit additionally to becoming a sexual actor or submit to a particular sexual act. The “use of authority” language in the criminal sexual conduct statutes merely requires that a victim submit to a defendant’s authority.

The primary goal of statutory interpretation is to ascertain and give meaning to the Legislature’s intent.⁴ Consideration of statutory language may include consideration of “its placement and purpose in the statutory scheme.”⁵ Finally, we should not read an added element into an unambiguous statute when that added element is not within the clear intent of the Legislature.⁶

The statutory subsection at issue is intended to increase criminal liability for those adult actors in authority positions who sexually assault children between the ages of thirteen and sixteen by also using their positions to coerce the victims into submitting. The subsection thus requires for aggravated liability that “the actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.”⁷ It does not and should not matter whether these authority figures actually coerce their victims into becoming active participants in the sexual behaviors. It is the abuse of the authority position, and not the particular behavior of the victim, that is the gravamen of this particular variety of sexual assault. For had the Legislature intended only the latter circumstance to control to the exclusion

⁴ *Webb*, 458 Mich at 273-274.

⁵ *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

⁶ *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

⁷ MCL 750.520c(1)(b)(iii).

of the former, it would have plainly stated a requirement that the actor used this authority to coerce the victim to submit to participation in the sexual acts.

This issue surfaces when considering the model jury instruction associated with this statutory subsection, CJI2d 20.4(4). This instruction tells the jury it must find that a defendant coerced the victim “...to submit to the sexual acts alleged.” Hence we have a disconnect between the statute and the jury instruction. In addition to the simple proposition that a jury instruction is in no way dispositive to proper statutory construction,⁸ consideration of the genesis of the jury instruction establishes that it is not an accurate statement of the Legislative language. While this inaccuracy is usually benign, it caused the trial court’s deviation from the plain Legislative meaning in this case.

The genesis of this superfluous clause can be divined from the jury instruction’s use note and consideration of the facts of two Court of Appeals cases, *People v Reid*⁹ and *People v Knapp*,¹⁰ listed within. In both of those cases the defendants were in positions of authority over their underage victims. In *Reid*, the defendant rubbed the victim’s genitals and directed the victim to rub the defendant’s genitals. Reid then fellated his victim and had the victim fellate him. The Court of Appeals ultimately found, using slightly varied terminology throughout its opinion, that the defendant had “used (his) position of authority to coerce the complainant to submit

⁸ See *People v Sullivan*, 231 Mich App 510, 520 n 1; 586 NW2d 578 (1998), and *People v Stephan*, 241 Mich App 482, 495; 616 NW2d 188 (2000).

⁹ *People v Reid*, 233 Mich App 457; 592 NW2d 767 (1999).

¹⁰ *People v Knapp*, 244 Mich App 361; 624 NW2d 227 (2001).

to the charged acts of sexual penetration.”¹¹ While that finding was undoubtedly correct, it unwittingly imposed some requirement that the victim’s submission had to be to the victim’s own participation in the sexual assault, and not merely to that defendant’s authority.

The same thing happened in *Knapp*, where that defendant, under the guise of teaching a “healing” class, had his victim feel the defendant’s genitals.¹² As in *Reid*, and citing *Reid*, the Court of Appeals found that the defendant’s conduct fell within the applicable CSC-2 statute because he “abuse(d) his position of authority to constrain a vulnerable victim by subjugation to submit *to sexual contact*.”¹³ Again, the Court of Appeals was correct, but the propriety of its particular word choice was dependant on the particular facts.

[Alas, this Court also used the questioned clause in a 1987 summary order for *People v Usman*.¹⁴ As the Court of Appeals noted in *Reid*, however, with no factual analysis in that order there can be no precedential analysis relating to the meaning of the “use of authority” language in the CSC statutes.¹⁵]

The core problem with the *Reid* and *Knapp* superfluous proclamations was that they both seemed to make a victim’s sexual participation a prerequisite for their defendants’ aggravated convictions (CSC-1 and -2 instead of CSC-3 and -4). The reason this prerequisite is superfluous can be seen by considering slight hypothetical changes to the facts in those cases.

¹¹ *Reid*, 233 Mich App at 468. Italics added.

¹² *Knapp*, 244 Mich App at 367.

¹³ *Knapp*, 244 Mich App at 369. Italics added.

¹⁴ *People v Usman*, 428 Mich 902; 406 NW2d 824 (1987).

¹⁵ *Reid*, 233 Mich App at 473.

Suppose those defendants had used their positions of authority in the exact same way but that the victims had remained entirely passive. The instant Reid began fellating his victim, he was still perpetrating CSC-1 under the plain meaning of the statute. And this is true even if his victim had immediately gotten up and left that defendant. Likewise, had the first sexual contact in *Knapp* been the defendant touching his victim's genitals only to have that victim immediately leave Knapp's presence, Knapp had still perpetrated CSC-2 (instead of just CSC-4) by misusing his authority contrary to the statute.

The essence of those slight hypothetical variations in *Reid* and *Knapp* manifest themselves in our case. At the time Defendant sexually assaulted the victim, he was in a position of authority over the victim, and used that authority to coerce the victim to submit. The submission took the form of the victim walking, at the direction of Defendant, into an otherwise unoccupied room where he was waiting to assault her. While the particular character of the victim's submission may not have included her becoming a willing, volitional participant in Defendant's sexual agenda, no such particularized submission is required by the plain statutory language.

The difference between the plain meaning of the statute and the jury instruction is evident in the Court of Appeals's opinion in this case. In the middle of page two of its slip opinion, the majority wrote:

The only pertinent inquiry is whether defendant used a position of authority "to coerce the victim to submit" to defendant's sexual contact.

Note the Court's use of quotation marks and how they separate the statutory requirement from the extraneous jury instruction. Later, on page three, the Court wrote – consistent with the plain statutory language:

Also, we do not believe that the victim needed to consent to defendant's groping in order for the jury to find that she submitted to his actions.

But even recognizing that, the Court later in the same paragraph returned to a discussion of how briefly the victim submitted to the sexual contact.

Therefore, the People believe that the Court of Appeals correctly reinstated Defendant's conviction by finding both that the victim submitted to Defendant's sexual contact for a few seconds (as required by the jury instruction) and that her submission to the sexual contact was not required under the statute. The People nevertheless request that this Court remove the superfluous requirement that a victim submit to becoming a participant in a defendant's sexual agenda and find that as a matter of law, Defendant was guilty of CSC-2 the very instant his hand touched the victim's buttocks. This will settle the proper interpretation of the "use of authority" language in the CSC statutes.

Deconstruction of the dissenting judge's analysis cements the People's position. That judge pointed out that "[i]n this case, the assault happened so unexpectedly and quickly that the victim could not immediately or instantaneously respond." The dissent went on to reason that based on the nature of the assault, the victim's behaviors did not fit the dictionary definition of "submit" in relation to Defendant's criminal actions. But that analysis would reward a defendant who assaulted a child unexpectedly and quickly, a reward completely at odds with the Legislative scheme.

That analysis can also be seen as conditioning aggravated criminal liability on how long a sexual assault lasted, or how well a child kept her wits about her as an authority figure was molesting or raping her, or how well her testimony matched some artificially heightened statutory standard.

The unavoidable ramifications of the dissent's analysis are fundamentally at odds with the Criminal Sexual Conduct statutes. There is no support in those statutes for the proposition that aggravated CSC liability depends as a matter of law on whether a defendant explicitly announces his intent to sexually fondle or penetrate his victim, or assaults his victim for some minimum duration, or successfully selects a victim who is willing to participate in his sexual agenda. The CSC statutory scheme is properly addressed to a defendant's actions, not his victim's responses. Serving as counter-example, the dissenting judge's analysis establishes this conclusion just as surely as the primary analysis of the plain meaning of the statute does.

II. The current jury instruction superfluously requires that a jury find that a defendant used his authority to coerce a victim to submit *to the sexual acts alleged*, instead of merely submitting to the defendant's authority. The correct application of the statutory language should assign aggravated criminal liability when at the time of a sexual assault an authority figure uses his authority to coerce a victim to submit.

The issue of the proper application of the "use of authority" language in the CSC statutes shares the same analysis as that for the proper interpretation, and need not be repeated. To give force to the proper application, the People request that this Court explicitly disavow the language in the jury instruction that is contrary to the Legislative meaning.¹⁶ CJI2d 20.4(4) currently reads:

that at the time of the alleged act the defendant was in a position of authority over [name complainant], and used this authority to coerce [name complainant] to submit to the sexual acts alleged. It is for you to decide whether, under the facts and circumstances of this case, the defendant was in a position of authority.

The People submit that CJI2d 20.4(4) should instead read:

that at the time of the alleged act the defendant was in a position of authority over [name complainant], and used this authority to coerce [name complainant] to submit. It is for you to decide whether, under the facts and circumstances of this case, the defendant was in a position of authority.

Defendants will remain free to argue to juries that at the time they were sexually assaulting their underage victims they were either not in a position of authority, or not coercing them, or both. What this proper instruction will preclude is any defense argument that concedes a sexual assault and a position of authority and coercion to that authority, while still denying submission by the victim to the sexual assault.

This distinction is consistent with the Legislative meaning and captures the proper application of the statutory language.

¹⁶ *Stephan*, 241 Mich App at 495.

Consistent with analysis in the first argument section, this Court's explicit disapproval of the extraneous jury instruction will not change the ultimate result in this case. In essence, this charge went to the jury on elements 1, 2, 3, 4a, 4b, and 4c, with 4a being that Defendant was in a position of authority, 4b being that he used his authority to coerce the victim to submit, and 4c being that the victim submitted to Defendant's touching her buttocks.¹⁷ The jury found all of the elements proven beyond a reasonable doubt. Now, with the proper application of the statute requiring only elements 1, 2, 3, 4a, and 4b, the prosecution has obviously still carried its burden beyond a reasonable doubt. Therefore, the Court of Appeals's opinion reinstating Defendant's CSC-2 conviction and remanding for resentencing should be affirmed.

¹⁷ Trial Court's December 22, 2005, Opinion and Order, at p 3.

