STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Donald E. Holbrook, Jr., Presiding Judge

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

vs.

MARK DREW PERKINS,

Defendant/Appellant.

_____/

Docket No. 120461
Court of Appeals No. 229111
Bay County CC No. 00-1112-FS
Bay County DC No. 99-4349-FY

BRIEF ON APPEAL – DEFENDANT/APPELLANT

(Oral Argument Requested)

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STATEMENT OF THE BASIS OF JURISDICTION OF THE MICHIGAN SUPREME COURT

In its Order entered in this case on May 7, 2002 (217a), the Michigan Supreme Court granted Defendant's application for leave to appeal from that part of the June 8, 2001 Court of Appeals Opinion (211a-215a), reversing the Examining Magistrate's decision denying bind-over on a charge of CSC I, MCL 750.520b(1)(f), engaging in sexual penetration with another person, causing personal injury to the victim and using force or coercion to accomplish sexual penetration on or about July 4, 1993. In the Court of Appeals, the Prosecutor had appealed Bay County Circuit Court Judge Kenneth A. Schmidt's Order granting the Defendant's motion to quash bind-over on a charge of misconduct in office, MCL 750.505 and denying the Prosecutor's motion to amend the information to reinstate the CSC I charge, 201a-209a. The Court of Appeals panel held that the Examining Magistrate abused his discretion in not binding Defendant over on a charge of CSC I, but affirmed the Circuit Court's dismissal of the misconduct in office charge and related felony-firearm charge. On May 10, 2002, counsel for Defendant filed a motion for a 30-day extension to timely file Defendant's brief and appendix under the authority of MCR 7.309(B)(3), 1dsa-2dsa. No order disposing of the motion has been entered, but a representative of the Michigan Supreme Court Clerk's office told Defendant's counsel's secretary that as long as Defendant's brief is filed within the 30-day extension period, an order will enter granting an extension to the date filed.

STATEMENT OF FACTS

Defendant was originally charged in a warrant authorized on June 18, 1999 with having committed four felony offenses on July 4, 1993:

Count I - CSC I, MCL 750.520b(1)(f), engaging in sexual penetration with another person, fellatio, causing personal injury to the victim and using force or coercion to accomplish the sexual penetration.

Count II - Felony Firearm, MCL 750.227(b), having a pistol in his possession at the time he committed CSC I.

Count III - Misconduct in office, a common law offense, MCL 750.505.

- and -

Count IV - Felony Firearm, MCL 750.227(b), having a pistol in his possession at the time he committed misconduct in office.

See Defendant-Appellant's Supplemental Appendix, pps. 3dsa-5dsa.

Following preliminary examination, the Examining Magistrate denied the Prosecution's motion to bind Defendant over on a charge of CSC I, 192a-198a. He bound Defendant over on the misconduct in office and related felony firearm charges, 198a-200a. The Circuit Court later granted Defendant's motion to quash the information charging him with misconduct in office and felony firearm, and denied the Prosecution's motion to amend the information seeking to reinstate the first degree criminal sexual conduct and felony firearm charges, 201a-209a.

The misconduct in office and felony firearm charges are not at issue in Defendant's appeal. The Court of Appeals panel affirmed the Circuit Court's dismissal of the misconduct in office and related felony-firearm charge in its June 8, 2001 unpublished Opinion, 214a-215a. It considered the dismissal of the felony-firearm charge related to the CSC I charge abandoned on appeal since the Prosecution did not raise or argue that the District Court erred in dismissing that charge, 212a, f.1.

The Court of Appeals panel held that the District Court abused his discretion in not binding Defendant over on the CSC I charge. Though clearly disagreeing with the District Court's determination concerning the sufficiency of the evidence presented by the Prosecutor on the issue of coercion, the panel never explained how the District Court abused his discretion. The panel stated in its Opinion (212a-214a) as follows:

> "Plaintiff first argues that the District Court erred in not binding over Defendant on the charge of CSC I. We agree. The element of CSC I at issue here is whether Defendant coerced Complainant to submit to sexual penetration. Plaintiff's theory of the case was that Complainant was coerced in that she was constrained by subjugation to submit. Plaintiff argues that Defendant used his position of authority over Complainant to train her that sexual relations were a normal and expected part of their relationship. Defendant's position of authority over Complainant, Plaintiff argues, was the result of her viewing Defendant as a surrogate father, as well as because of his position as a deputy sheriff.
>
> . . .
>
> These cases show that exploitation of a position of authority can be accomplished in a variety of ways. The continuum of such exploitation stretches, at least, from very 'subtle persuasion' to more direct application of the 'power to require and receive submission [and] the right to expect obedience from the victim'. (citations omitted). At some point, which we do not identify for purposes of this case, this later form of exploitation becomes a form of subjugation. It is this type of exploitation, i.e., subjugation through exploitation of a position of authority, that the Prosecution argues occurred in the case at hand.
>
> After reviewing the record, we conclude that enough evidence was presented at the preliminary hearing through which the element of coercion may be inferred. The prosecution established that the sexual relationship began when complainant was at a vulnerable age (aged 12). At first, the relationship between complainant and defendant was centered on the girl's participation in junior high school basketball. Defendant's wife was complainant's coach, and defendant was apparently actively involved in the team's activities. Then, complainant was asked to baby-sit for defendant's children. Eventually, complainant was spending time at defendant's home

> even when she was not baby-sitting. Sometimes, complainant would spend the night. Complainant testified about how she began to feel like a part of defendant's family, and how she looked on defendant as being the father that she did not have. The two would spend time together at a shooting range, defendant's family cabin, and complainant's home. We believe that this evidence is sufficient for the prosecution to argue to the trier of fact that defendant was in a position of authority over complainant.
>
> We further conclude that sufficient evidence was presented for the prosecution to argue its theory of subjugation. The evidence establishes a gradual build up of involvement between complainant and defendant. At some point, defendant's behavior toward complainant became sexually suggestive; complainant testified that defendant would often touch her buttocks and direct sexually suggestive comments toward her. Next, while complainant was aged 12, their involvement came to include sexual intercourse, which according to complainant lasted until she was aged 18. Complainant testified that from the very first, sexual activity simply became "automatic" and "something that was expected." Regarding the sexual encounter at the heart of the present charge, complainant testified that while defendant had not physically forced her into the act, he "had manipulated [her] mind." She continued: "I feared – you have to understand I loved this person like a father figure and I was scared to say no to him."
>
> Therefore, looking to the circumstances set forth at the preliminary hearing, (citation omitted), we hold that the district court abused its discretion in not binding over defendant on the charge of CSC I. The evidence presented at the preliminary hearing was sufficient to establish that CSC I had been committed and that there is probable cause to believe that defendant committed it. . . . .
>
> . . ."

Defendant was not charged with using a position of authority to accomplish sexual penetration. Also the record of the preliminary examination is devoid of any evidence that Defendant was in a legally-recognized position of authority over Complainant on July 4, 1993.

What is at issue in Defendant's appeal is the Court of Appeals' determination that the Examining Magistrate abused his discretion in not binding Defendant over for Circuit Court trial

on the CSC I charge and, also, the propriety of the Prosecution's subjugation theory in a case where the charge is CSC I, MCL 750.520b(1)(f), engaging in sexual penetration with another person, causing personal injury to the victim and using force or coercion to accomplish sexual penetration, *not* MCL 750.520b(1)(b)(iii), engaging in sexual penetration where the other person is at least 13 but less than 16 years of age and the actor is in a position of authority over the victim and used this authority to coerce the victim to submit, or MCL 750.520b(1)(h)(ii), engaging in sexual penetration with another person who is mentally incapable, mentally disabled, mentally incapacitated or physically helpless and the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

Only two witnesses testified at the preliminary examination in this case – the Complainant and psychologist Rosemary Jalovaara. Both of these witnesses were called by the Prosecution. Defendant did not present any proofs.

Complainant testified at preliminary examination that her date of birth is July 12, 1976, 11a. The Prosecution, over Defendant's objection (12a, 14a-19a), elicited testimony from her about her relationship with Defendant in support of a subjugation theory to the effect that due to the relationship, she was unable to resist his invitation for sexual contact. The Complainant who lived, at all relevant times, with her mother (70a, 112a) testified that she had known Defendant and his family since she was 12 years-old, 11a. She testified that she looked up to Defendant as a father figure, 13a. She testified that on the morning of Sunday, July 4, 1993, when she was 16 years-old, following her return from a month-long trip to Mexico, she telephoned Defendant and left a voice mail message for him, (54a-55a, 80a-82a). He telephoned her back and asked her to meet him behind Euclid Tool Company in an industrial park off of Mackinaw Road, (55a, 80a-82a). She testified that she and Defendant were having an affair at the time, 79a. She testified

that she and Defendant were lovers, (89a, 93a). She testified that at this time she knew she could end the relationship and that Defendant was not in a position of authority over her, (75a, 77a-79a). She testified that she agreed to meet Defendant, a Bay County deputy sheriff, knowing that he was on duty, in a patrol car, in uniform, armed with a handgun and that she would engage in sex with him, (81a-82a, 113a). She drove from her home in Auburn to the meeting place, a 10-minute drive, 83a. She got out of her car and got into Defendant's patrol vehicle, (56a, 84a). Once inside the patrol vehicle, the two hugged each other, 85a. They talked about her trip to Mexico, 85a-86a. Then, she performed oral sex on him, (56a, 86a).

Complainant testified that Defendant did not pressure her in any way into meeting with him, 84a. She testified that she agreed to perform oral sex on Defendant freely and voluntarily, (87a-88a, 92a). She testified that Defendant did not use physical force or physical violence against her, 88a. He did not threaten her in any manner, 89a. He did not overcome her through concealment, or by the element of surprise; in fact, she specifically testified in answer to a question by the Court that she knew when she left her home in Auburn that she would probably engage in sex with Defendant at the meeting place, 113a. None of the circumstances identified in MCL 750.520b(1)(f)(i)-(v) are present in this case.

Complainant testified that prior to July 4, 1993, at a time when she was in 11th grade, she decided to end her relationship with Defendant, (51a-52a, 76a-77a, 109a-110a). She discussed ending the relationship at that time, 109a-110a. She testified that by July 4, 1993 she felt she could end the relationship with Defendant if she wanted to do so, 79a. She also testified that up to a certain point in time she thought that she and Defendant would get married, (93a, 111a).

The Prosecution also presented the testimony of psychologist Rosemary Jalovaara who testified that she never treated, consulted, examined, tested, or had any contact with Complainant

(150a-152a) in support of its subjugation theory. No evidence was presented that she had reviewed any of Complainant's medical or psychological records. She testified in reply to a question by the Court that without examining an individual who has been a victim of subjugation at an early age, she could not tell how long the influences and forces of subjugation would last, 183a.

In its bind-over argument, the Prosecution wanted the Examining Magistrate to expand the definition of coercion to include an apparently wholly voluntary act of fellatio between the Complainant who was just a few days short of her 17th birthday and Defendant, lovers, who had a long-standing relationship. Despite the fact that Complainant testified that she knew from the start that having sexual relations with Defendant was wrong (21a), the Prosecution argued at preliminary examination, that Defendant who it asserts was a surrogate father taught Complainant that having sex was just a normal, natural part of their relationship, in effect, making her his sex slave so that she was "constrained" by subjugation to do as she had been taught -- the act of fellatio performed on July 4, 1993, therefore, not being the product of a free choice, but the end result of years of behavior training.

The Examining Magistrate noted that the testimony in the case was uncontroverted, 192a. He determined that a subjugation theory is, in fact, a proper theory, 193a. He stated that the Prosecution appeared to rely on three bases to establish its subjugation theory: first, that Defendant was a police officer; second, that at one point, he was an assistant coach on a team Complainant was on; and, third, that he was a father figure to her, 193a-194a.

As to the first and second bases of the Prosecution's subjugation theory, the Examining Magistrate noted:

> ". . . there has been no indication shown to the Court that at the time of the offense in 1993 that the defendant was in any way acting through any pressure or belief that if she failed to give sexual – perform sexual acts to the – on the defendant that he would somehow act in his capacity as a police officer or that she was in any way intimidated or threatened by the status of his being a police officer at that time. Also as to the assistant coach, for want of a better word, role of the defendant, this was tenuous at best and I believe was maybe one or two isolated occurrences. And there certainly is no showing again that by 1993 if in fact the defendant was acting in that capacity that this in any way affected the mental state of the victim or to cause her to come under any kind of pressure or authority or a subjugation theory." (194a)

The Examining Magistrate recognized that the thrust of the Prosecution's argument was that the Complainant having been engaged at a young age in a sexual relationship over a long period of time rendered her subjugated to Defendant's requests for sexual favors to the extent that she did not have the ability to refuse them, 194a. The Examining Magistrate stated:

> ". . . the question the court must address is the state of the mind and the status of the parties at the time of the offense in context with the earlier acts.
>
> The court is simply not convinced that the people have established probable cause to believe that the offense charged has been committed in this regard. Although certainly the victim had a relationship with the defendant as of the date of the offense, the Court notes several factors that it considered in its opinion. First of all, this was the last sexual encounter with the defendant; the age of the victim; the victim and the defendant were not living together or seeing each other on a regular basis as they had been; the victim was at home living with her mother at the time. The meeting on the date of offense was entirely voluntary on the victim's part; the parties having been separated for some period of time, somebody was on a vacation. I don't really recall who. The victim had on at least one prior occasion had tried to break off the relationship with the defendant but in the opinion of the court one of the reasons why she continued the relationship was she was in fact hoping that the defendant might leave his wife and marry her." (195a-196a)

The Examining Magistrate also cited the testimony of Rosemary Jalovaara in explaining his denial of a bind-over on the CSC I charge, 196a. He noted that Ms. Jalovaara never interviewed or treated Complainant, that she never examined any of Complainant's medical or psychological history or records and that her testimony as to profiling did not rise to the level of a syndrome which would have been helpful, 196a.

The Examining Magistrate concluded:

> ". . . the Court is simply not able to determine that the People have shown probable cause that the victim's free will was so overcome by the past acts of the defendant or their relationship that she was unable to resist the invitation for sexual contact. . . ." (198a)

I.

QUESTION PRESENTED

Is the Court of Appeals panel's holding that the Examining Magistrate abused his discretion in not binding-over Defendant on a CSC I charge clearly erroneous for the reason that the panel merely substituted its judgment for the magistrate's in this case where a review of the whole preliminary examination record discloses an, apparently, wholly voluntary act of fellatio between Complainant who was just a few days shy of her 17th birthday and Defendant, lovers, who had a long-standing relationship, and does not support by the probable cause standard the Prosecutor's novel coercion theory that Complainant's will was so overcome by past acts of Defendant or their relationship that she was unable to resist his invitation for sexual contact?

This question was not presented to the Examining Magistrate or the Circuit Court who, consequently, never answered it.

The Court of Appeals answers, "No."

The Plaintiff/Appellee answers, "No."

The Defendant/Appellant answers, "Yes."

ARGUMENT

WHERE A REVIEW OF THE WHOLE RECORD OF THE PRELIMINARY EXAMINATION IN THIS CASE SHOWS THAT AN ACT OF FELLATIO BETWEEN COMPLAINANT WHO WAS JUST A FEW DAYS SHY OF HER 17TH BIRTHDAY AND DEFENDANT, LOVERS, WHO HAD A LONG-STANDING RELATIONSHIP WAS, APPARENTLY, VOLUNTARY AND DOES NOT SUPPORT BY THE PROBABLE CAUSE STANDARD THE PROSECUTOR'S NOVEL COERCION THEORY THAT COMPLAINT'S WILL WAS SO OVERCOME BY PAST ACTS OF DEFENDANT OR THEIR RELATIONSHIP THAT SHE WAS UNABLE TO RESIST HIS INVITATION FOR SEXUAL CONTACT, THE COURT OF APPEALS PANEL'S HOLDING THAT THE EXAMINING MAGISTRATE ABUSED HIS DISCRETION IN NOT BINDING-OVER DEFENDANT ON A CSC I CHARGE IS CLEARLY ERRONEOUS FOR THE REASON THAT THE PANEL MERELY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE MAGISTRATE.

DISCUSSION

The appropriate standard of review of the Court of Appeals' holding that the District Court abused his discretion in not binding over Defendant on the CSC I charge is the "clearly erroneous" standard. A holding is considered "clearly erroneous" if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made, *People v. Gistover*, 189 Mich App 44, 46 (1991). See, also, *People v. Hermiz*, 235 Mich App 248, 255 (1999); aff'd 462 Mich 71 (2000). *Gistover, supra*, dealt with the issue of whether a type of scientific evidence has been accepted as reliable by the scientific community. *Hermiz, supra*, dealt with a trial court's application of the "totality of the circumstances" test in determining whether the defendant's state and federal indictments for conspiracy to possess with intent to deliver cocaine arose from a single conspiracy for purposes of the state statutory double jeopardy bar to drug prosecutions.

In the case at bar, the Court of Appeals panel was dealing with a Prosecutor's appeal of a Circuit Court's decision to deny his motion to amend information to reinstate a CSC I charge.

The standard of review of such a decision is the abuse of discretion standard, *People v. Goecke*, 452 Mich 442, 462 (1998). In *Goecke, supra*, the Examining Magistrate had denied the Prosecutor's motion to bind the defendant over on a charge of second degree murder, but bound him over on an alternate charge of operating a motor vehicle while under the influence of intoxicating liquor, causing death. The substantive issue in the case was whether the District Court abused its discretion by not binding the defendant over on the charge of second degree murder. In *Goecke, supra*, at p. 463, it is clear from the Opinion that the Michigan Supreme Court made a review of the entire preliminary examination record to determine whether the District Court's failure to bind defendant over on a charge of second degree murder was an abuse of discretion.

An Examining Magistrate must discharge a defendant if it appears at the conclusion of the preliminary examination either that an offense has not been committed or that there is not probable cause for charging the defendant, *MCL 766.13*. In *People v. King*, 412 Mich 145, 153-154 (1981) the Michigan Supreme Court, citing with approval *Yaner v. People*, 34 Mich 286, 288-289 (1876), described the Examining Magistrate's function at preliminary examination:

> " 'The Magistrate, before whom any person is brought upon the charge of having committed an offense not cognizable by a Justice of the Peace, shall proceed to examine the Complainant and the witnesses in support of the prosecution, on oath, in the presence of the prisoner, in regard to the offense charged, and in regard to any other matters connected with such charge, which he may deem pertinent.- [1871 CL 7855]. And it is only when it shall appear from such examination that an offense not cognizable by a Justice of the Peace has been committed and that there is probable cause to believe the prisoner guilty thereof, that he can be held for trial.- [1871 CL 7859, 7860]. The clear evident intent of this statute was,

> that the Magistrate should exercise his best judgement in the matter; that he should from the testimony determine whether the crime charged in the warrant had been committed, or where, as in this case, the offense charged includes one or more of lesser degree, the Magistrate should determine which offense, if any, had been committed, so that the accused might not be placed upon trial in the Circuit Court to answer to a charge different or greater than the one upon which he had been examined, and to answer which he had been held for trial.' (Citation omitted).
>
> "The Magistrate 'must have . . . good reason to believe appellant guilty of the crime charged.' The Magistrate has 'the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses' and may consider evidence in defense. He or she should not, however, discharge 'when evidence conflicts or raises reasonable doubt [the defendant's] guilt', since that presents the classic issue for the trier of fact."
>
> "Without regard to the defense's evidence of intoxication and provocation, the Court of Appeals found the prosecution had presented evidence on each element of first degree murder and therefore found an abuse of discretion in the Magistrate's failure to bind-over on that charge. In so doing, the Court of Appeals too narrowly conceived the scope of the inquiry. The inquiry is not limited to whether the prosecution has presented evidence on each element of the offense. The Magistrate is required to make his determination 'after an examination of the whole matter'. Although the prosecution has presented some evidence on each element, if upon an examination of the whole matter the evidence is insufficient to satisfy the Magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he should not bind the defendant over on the offense charged but may bind him over on a lesser offense as to which he is so satisfied."

In *King, supra*, the Examining Magistrate, after examining the whole matter, opined that there was not sufficient evidence to warrant the charge of first-degree murder. Specifically, he found that there was sufficient evidence to indicate that defendant did not intend to take a life and that he had not committed an assault under such circumstances that the natural and usual consequences would be death. He did bind defendant over to Circuit Court trial on a charge of manslaughter.

In making a probable cause determination for purposes of bind-over, an Examining Magistrate must consider mitigating evidence, *People v. Neal*, 201 Mich App 650, 655 (1993). While a reviewing court may not agree with the judgment of a Magistrate, except in the case of a clear abuse of discretion, the findings of the lower court will stand, *People v. Paille #2*, 383 Mich 621, 627 (1970). An appellate court may not agree with the findings of an Examining Magistrate, but it has no right to substitute its judgment for his except in the case of a clear abuse of discretion, *People v. Yeotis*, 41 Mich App 766, 770 (1972). The reviewing court will not substitute its judgment for that of the Examining Magistrate, but will only reverse if it appears that the Magistrate clearly abused his discretion, *People v. Gadient*, 185 Mich App 280, 286 (1990). An abuse of discretion can be found only where an unprejudiced person, considering the facts upon which the court made its decision, would say that there was no justification or excuse for the ruling, *People v. Orzame*, 224 Mich App 551, 557 (1997).

In *Neal, supra*, the Court of Appeals panel reversed an order of the Macomb County Circuit Court reversing the Examining Magistrate's decision to bind defendant over on a charge of voluntary manslaughter rather than second-degree murder. The Court of Appeals panel concluded that the entire record supported the District Court's conclusion that defendant did not act with malice at the time of the shooting because he felt that he was in mortal fear for his safety and well-being. In *Paille #2, supra*, the Michigan Supreme Court affirmed the decision of a Recorder's Court judge denying the prosecutor's motion to reinstate and bind defendants over for trial on a charge of conspiracy to commit a legal act in an illegal manner where the Examining Magistrate had dismissed the charge, largely on a determination that the People's witnesses were not credible. In *Yeotis, supra*, the Court of Appeals upheld a dismissal of a conspiracy to commit murder charge against one particular defendant on the basis that it was the Examining Magistrate's

right and duty to pass judgment on the credibility of the witnesses as well as the weight and competency of the evidence. The Court of Appeals panel determined that consideration of the testimony presented at the preliminary examination did not reveal a clear abuse of discretion. In *Gadient, supra*, the Court of Appeals affirmed the Examining Magistrate's and Circuit Court's determinations that the prosecution had failed to make a *prima facie* showing that the defendant had converted certain interest monies to his own use without the consent of his client and that the defendant had the specific intent to defraud at the time of the alleged conversion, both of which elements are necessary to a conviction of the charged offense which was embezzlement. In *People v. Harris*, 159 Mich App 401 (1987), defendant was charged with open murder. Following preliminary examination, the Examining Magistrate determined that the shooting in the case was accidental and entered an order dismissing all charges against the defendant. The prosecution appealed the dismissal to the Circuit Court which affirmed the Examining Magistrate's decision. In reversing the Examining Magistrate and the Circuit Court, the Court of Appeals panel determined that the Examining Magistrate did not err in refusing to bind the defendant over for trial on an open murder charge, but should have considered binding him over on a lesser included offense where such an offense is supported by the evidence at preliminary examination. *Harris, supra,* stands for the proposition that even where the charged offense has not been established, defendant should be bound over on a lesser included offense if one is established. In *People v. 68th District Judge*, 44 Mich App 553 (1973), the Court of Appeals determined that a District Judge did not abuse his discretion in denying bind-over where, at preliminary examination on a conspiracy charge, the only out-of-court statements by a co-conspirator linking defendant to the conspiracy were not admissible against the defendant since there was no proof *aliunde* connecting the defendant to the conspiracy.

In reversing the Examining Magistrate's decision in this case, the Court of Appeals panel never cited any of the Examining Magistrate's fact findings or determinations. It never explained how he abused his discretion other than to state the opinion that there was sufficient evidence for a bind-over. It is clear from a reading of its opinion that it did not agree with him and merely substituted its judgment for his.

The Court of Appeals was not content in this case to let the Magistrate exercise his best judgment in the matter. This is not a case where there was conflicting evidence before the Examining Magistrate or evidence raising a reasonable doubt concerning guilt. This was a case where the Examining Magistrate determined that the evidence was not sufficient to establish that the charged offense had been committed by the probable cause standard. A review of the entire record does not support the Court of Appeals' conclusion that the Examining Magistrate abused his discretion in refusing to bind Defendant over on the CSC I charge. Certainly it cannot be said that there is no justification or excuse for the Magistrate's determination in this case where: the evidence was not convincing that the Complainant was in any way acting through any pressure or belief that if she failed to perform a sexual act on the Defendant that he would somehow act in his capacity as a police officer or that she was in any way intimidated or threatened by the status of his being a police officer; there was no evidence that he was her coach or exercised any recognized position of authority over her; Complainant and Defendant were not living together or seeing each other on a regular basis; the Complainant was at home living with her mother at the time of the alleged offense; that the meeting on the date of offense, July 4, 1993, was entirely voluntary on the victim's part; the Complainant had recently returned from a vacation in Mexico where she had been for a month; the Complainant knew she could end the relationship any time she wanted to and, in fact, had tried to break off the relationship but decided not to because she

was hoping Defendant might leave his wife and marry her; the evidence of the child psychologist who testified showed that she never interviewed or treated Complainant; she never examined any of Complainant's medical or psychological history or records; her testimony did not show a syndrome; and, she could not testify as to how long the effects and forces of subjugation would last.

The better-reasoned cases clearly credit the Examining Magistrate's exercise of discretion with something. They do not require him to merely rubber stamp a Prosecutor's charging decision, or bind-over just because there is a difference of opinion between the Prosecutor and defense attorney over the sufficiency of evidence offered in support of a charge at preliminary examination. An Examining Magistrate is supposed to exercise critical judgement. As is pointed out in *King, supra*, he is supposed to bind the defendant over for Circuit Court trial only when it appears to him that the charged offense has been committed. The purpose is to assure that a defendant will be forced to stand trial in Circuit Court and incur the expense and the risks of that experience only if the Magistrate is convinced that there is sufficient evidence of each element of the charged offense to merit a trial.

In the case at bar, if the Defendant is required to stand trial in Circuit Court, he will have to defend against the Prosecution's novel theory of coercion by subjugation. The Prosecution intends to present evidence that he and Complainant had been engaging in sexual acts since she was twelve years-old. It is conceivable that he could be convicted by a trier-of-fact that believes that he engaged in the earlier, uncharged acts without ever really understanding the Prosecution's subjugation theory at all. The Court of Appeals panel seems to have been greatly influenced by this evidence of prior acts which could not be charged due to the statute of limitations. Defendant

should not be required to run this hazardous gauntlet unless there is, in fact, sufficient evidence to support the Prosecution's subjugation theory.

II.

QUESTION PRESENTED

Does the Court of Appeals' holding reversing the decision of the Examining Magistrate in this CSC I case where the Prosecution has asserted a subjugation theory to the effect that Defendant used his position of authority to train Complainant who was just shy of her 17th birthday that sexual relations were a normal and expected part of their relationship to establish the necessary element of coercion despite the fact that the record of the preliminary examination is totally devoid of any evidence that Defendant occupied any legally-recognized position of authority over her on the July 4, 1993 date of offense, suggest the need to clarify and limit the concepts of "position of authority" and "coercion" as they are meant in the state's criminal sexual conduct enactment?

This question was not presented to the Examining Magistrate or the Circuit Court who, consequently, never answered it.

The Court of Appeals answers, "No."

The Plaintiff/Appellee answers, "No."

The Defendant/Appellant answers, "Yes."

ARGUMENT

BY CREDITING AS A TENABLE LEGAL THEORY TO ESTABLISH THE COERCION ELEMENT OF CSC I THE PROSECUTION'S SUBJUGATION THEORY TO THE EFFECT THAT DEFENDANT USED HIS POSITION OF AUTHORITY TO TRAIN COMPLAINANT WHO WAS JUST SHY OF HER 17TH BIRTHDAY THAT SEXUAL RELATIONS WERE A NORMAL AND EXPECTED PART OF THEIR RELATIONSHIP DESPITE THE FACT THAT THE RECORD OF THE PRELIMINARY EXAMINATION IS TOTALLY DEVOID OF ANY EVIDENCE THAT DEFENDANT OCCUPIED ANY LEGALLY-RECOGNIZED POSITION OF AUTHORITY OVER HER ON THE JULY 4, 1993 DATE OF OFFENSE, THE COURT OF APPEALS' DECISION IN THIS CASE SUGGESTS THE

NEED TO CLARIFY AND LIMIT THE CONCEPTS OF "POSITION OF AUTHORITY" AND "COERCION" AS THEY ARE MEANT IN THE STATE'S CRIMINAL SEXUAL CONDUCT ENACTMENT.

DISCUSSION

In this case the Prosecution and, apparently, the Court of Appeals would like to expand the definition of "coercion" to include a situation where the actor is what they characterize as a "surrogate father". This is not lawful under the pertinent provision of statutory construction where, as in this case, there is one statute which has inclusive general language describing "force or coercion" applying to the charged means of accomplishing sexual penetration [i.e., (i)-(v) of MCL 750.520b(1)(f)] and other ways of committing sexual penetration specifically described in another part of the same statute [i.e., MCL 750.520b(1)(b)(iii) and MCL 750.520b(1)(h)(ii)], *People v. Patterson*, 428 Mich 502, 527 (1987). In *Patterson, supra*, the Michigan Supreme Court quoted with approval the following principle of statutory construction, ". . . 'however inclusive may be the general language of the statute, it will not be held to apply or prevail over matters specifically dealt with in another part of the same enactment.' (Citation omitted.)", *Patterson, supra* p. 527.

The part of the CSC I enactment Defendant is accused of violating, MCL 750.520b(1)(f), provides, in pertinent part, as follows:

> "(1) A person is guilty of criminal sexual conduct in the first degree if he . . . engages in sexual penetration with another person and if any of the following circumstances exists:
>
> . . .
>
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor causes the victim to submit by threatening to use force or violence on the victim and the victim believes that the actor has the present

penetration is excluded from the definition of coercion since such a circumstance is specifically identified in two other places within the same statute that the Defendant is charged with violating. Further, it seems patently obvious that since the legislature identified being in a position of authority in two places in the same enactment, it would have added such a circumstance to the list of circumstances establishing force or coercion if it had intended it to be included within such circumstances. The Prosecution's subjugation theory is not a legally-permissible theory.

The *Premo* and *Knapp* cases cited by the Court of Appeals panel in its Opinion are really not helpful to disposition of the issue in this case. In *People v. Premo*, 213 Mich App 406 (1995), a CSC IV case, the Court of Appeals determined that the act of pinching the victims' buttocks satisfied the force element of the statute because the act required the actual application of physical force. Despite the fact that not many case facts are stated in the Court of Appeals panel's Opinion, it went on to determine that the Defendant's actions also constituted implied, legal or constructive coercion because, as a teacher, Defendant was in a position of authority over the student victims and the incidents occurred on school property. The Opinion does not state any facts from which it can be concluded that the teacher used his position of authority to coerce the victims. Likewise, in *People v. Knapp*, 244 Mich App 361 (2001), the Defendant was convicted of CSC II, MCL 750.520c(1)(b)(iii), victim at least 13 but less than 16 years of age with the actor in a position of authority over the victim and the actor using this authority to coerce the victim to submit. The real issue in the case was whether the Defendant who was the 15 year-old victim's Reiki teacher was in a position of authority over the youth. The Court of Appeals seems to be intent on expanding the definition of "coercion" to the point where there will be no standards by which triers-of-fact will be able to determine *objectively* whether a defendant's conduct is criminal. In the case at bar, the Court of Appeals panel has decided that a wholly voluntary act

of fellatio was the product of coercion by a Defendant in a position of authority over the victim in circumstances where there is no evidence that Defendant was, in fact, in a position of authority over Complainant and, more importantly, *Defendant has never been charged with committing criminal sexual conduct by being an authority figure* and using his position of authority to coerce the victim to submit.

In the case at bar, Complainant was never in any legally-recognized position of vulnerability to Defendant. He was never her teacher, counselor, coach or clergyman. She testified that she viewed him as a father figure, but he was not, in fact, her father. The two were not even living under the same roof. She was living with her mother at all relevant times. She testified that she knew she could end the relationship with Defendant. He simply was not in any legally-recognized position of authority over Complainant. The act of fellatio proven in this case was a free act, not the product of coercion. Complainant testified that when she made the 10-minute drive to the meeting on July 4, 1993, she was expecting to engage in sex. She testified that she engaged in the complained-of act for, among other reasons, the reason that she was afraid of losing Defendant. There is no evidence in the record of this case that Defendant ever threatened to leave her if she didn't have sex with him. She is no different from any young girl who was in love for the first time. Is every girl who has sex with a boyfriend because she is afraid of losing him a rape victim? Is every wife who has sex with her husband because she is afraid of losing him a rape victim? In order to have meaningful due process, criminal conduct has to be clearly marked by bright lines. Where the parties are not members of the same household and are not related by blood or marriage, where Defendant is not Complainant's teacher, counselor, therapist, minister or coach and where the record clearly shows that and Complainant admits that Defendant was never in a position of authority over her and knew she could end the

relationship with him, it is violative of Defendant's due process rights to conclude that he was in a position of authority over her based on the determination that he was her "surrogate father". The concept of "surrogate father" as urged by the Prosecution is too broad, too vague, too nebulous. Where the parties are not living under the same roof, the concept could arguably include any adult who has the respect of any child. Any coach, teacher, relative, clergyman, neighbor, friend's parent, etc., who has had any influence over a minor child could arguably be characterized as a surrogate parent if the court concludes that under the circumstances of this case, Defendant who did not live with Complainant but had a long-standing relationship with her was her surrogate parent who subjugated her to his will in order to sexually abuse her. It is not possible to defend Defendant if the Prosecution is allowed to proceed on such a theory that is not limited by bright boundary lines. The Court of Appeals panel may not have liked what they think happened in this case over the years, but they must be held to the fact that the only criminal act charged was one that allegedly took place on July 4, 1993. Defendant should be entitled to rely on solid, substantive law. In this case, the prevailing party is likely to be the one who presents the testimony of the most eager-to-please psychologist. The Court of Appeals panel may not have liked the idea of having to keep the Prosecution's legal theory within some understandable boundaries, but Defendant has that procedural and substantive due process right. The Prosecution's theory, in this case, as applied to Defendant, is too vague, too overbroad, too nebulous to defend against. Another likely scenario is that a trier-of-fact might convict Defendant of CSC I if it believes that he engaged in the earlier, uncharged acts without ever really understanding the Prosecution's subjugation theory at all.

In this case, it is clear that the six-year limitation of MCL 767.24 precluded the Prosecution from charging CSC I, MCL 750.520b(1)(a), actor engaging in sexual penetration with

another person who is under 13 years of age, or MCL 750.520b(1)(b)(iii), actor engages in sexual penetration with another person who is at least 13 but less than 16 years of age and is in a position of authority over the victim and used this authority to coerce the victim to submit. The Prosecution undoubtedly would have liked to have charged Defendant with CSC I, engaging in sexual penetration with another person under 13 years of age. That charge is, obviously, much easier to prove. It is fairly debatable whether the engaging in sexual penetration with another person at least 13 but less than 16 years of age and actor being in a position of authority over the victim and used this authority to coerce the victim to submit would have been a proper charge even if Complainant had been under 16 years of age at the time of the complained-of act because there is no evidence in this case that Defendant was in a legally-recognized position of authority over Complainant, but it appears that the Prosecution would like to do that. The fact is that the Prosecution has ignored the fact that to charge CSC I on the basis that the actor is in a position of authority over the victim and used this authority to coerce the victim to submit, the victim must be at least 13 but less than 16 years of age. That charge would better fit the facts of the case at bar if, in fact, the Complainant had been at least 13 but less than 16 years of age on July 4, 1993. Both the Prosecution and the Court of Appeals have ignored the "at least 13 but less than 16 years of age" element of that charge. They should not be permitted to do that in violation of Defendant's procedural and substantive due process rights. Somewhere along the line a court has to draw some lines separating what is criminal sexual contact and what is not. The Court of Appeals has stated in its Opinion (213a-214a), that it is not willing to identify the point at which the continuum of exploitation of a position of authority changes from very "subtle persuasion" to subjugation. It seems like the legislature recognized the vulnerability of children at least 13 years of age but less than 16 years of age by making it a criminal act for one in a position of authority

over them to use that position of authority to coerce them to engage in an act of sexual penetration. The Prosecution and the Court of Appeals in this case are intent upon ignoring the "at least 13 but less than 16 years of age" element and applying it to the facts of this case where the Complainant was just a few days shy of her 17th birthday on the date of offense. They want to create a new way of committing CSC I. Coupled with the fact that Defendant was never in any legally recognizable position of authority over the Complainant, it is clear that it would be beneficial to the jurisprudence of this state for the Supreme Court to identify what "position of authority" means for purposes of the criminal sexual conduct enactment and, also, to limit what "coercion" includes in circumstances where the Defendant is not charged with engaging in sexual penetration with a person who is at least 13 but less than 16 years of age, or the other person is mentally incapable, mentally disabled, mentally incapacitated or physically helpless.

RELIEF REQUESTED

Defendant requests entry of an order reversing that part of the Court of Appeals decision reversing the Examining Magistrate's decision denying bind-over on a charge of CSC I and/or granting such other and further relief as shall be agreeable to equity and good conscience.

DATED: This 19th day of July, 2002.

DARBEE, BOSCO & HAMMOND, P.C.

By: James M. Hammond

James M. Hammond
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