

1-17-2012

State v. Olin Appellant's Brief Dckt. 38056

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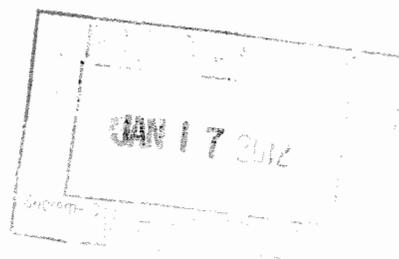
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 v.)
)
 JERRY LEE OLIN,)
)
 Defendant-Appellant.)
 _____)

NO. 38056

REVISED
APPELLANT'S BRIEF



COPY

REVISED
BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

HONORABLE BENJAMIN R. SIMPSON
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jerry Lee Olin timely appeals from the Judgment, wherein the district court imposed upon him concurrent unified sentence of fifteen years, with ten years fixed, following his guilty pleas to three counts of sexual abuse of a child under sixteen years of age for conduct occurring between November 2001 and September 2002. He asserts that, because the statute defining the offense of sexual abuse that existed at the time he was alleged to have committed this offense did not criminalize the behavior that he was charged with in Count I, the district court lacked subject matter jurisdiction over the charge.

Statement of the Facts and Course of Proceedings

The prosecutor charged Mr. Olin by Indictment with three counts of lewd conduct and five counts of sexual abuse of a child for conduct that occurred between November 2001 and September 2002. (R., pp.8-11.) Pursuant to a plea agreement, the State filed an Amended Indictment charging Mr. Olin with three counts of sexual abuse of a child under the age of sixteen for conduct occurring between November 2001 and September 2002. (Tr., p.6, Ls.22-24; R., pp.80-82.) In Count I, the prosecutor alleged that Mr. Olin violated the law by committing sexual abuse of a child under sixteen years of age under I.C. § 18-1506 (1)(d), by masturbating in the presence of a child. (R., pp.80-81.) In Counts II and III, the prosecutor alleged that Mr. Olin violated the law by committing sexual abuse of a child under the age of sixteen under I.C. § 18-1506(1)(b), by rubbing the breasts of two children. (R., pp.80-81.) The prosecutor dismissed the other allegations contained in the original Indictment. (Tr., p.6, Ls.15-18; R., pp.83-85.)

Although the maximum punishment for violating I.C. § 18-1506 during the period from November 2001 through September 2002, was fifteen years, the district court imposed upon Mr. Olin concurrent unified sentences of twenty years, with ten years fixed. (R., pp.165-168.) Recognizing the illegal sentence, the State agreed to remand the matter for a new sentencing hearing. (See Order dated May 16, 2011.) On remand, the district court imposed upon Mr. Olin concurrent unified sentences of fifteen years, with ten years fixed. (See Order Granting Motions To Augment, Leave To File A Revised Brief And To Suspend the Briefing Schedule, augmenting the July 29, 2011 Amended Judgment.) A clerical error exists in the Amended Judgment as it reflects the counts contained in the original Indictment and not the Counts from the Amended Indictment.¹ (See Order Granting Motions To Augment, Leave To File A Revised Brief And To Suspend the Briefing Schedule, augmenting the July 29, 2011 Amended Judgment; see *also* R., pp.80-82.) Mr. Olin timely appealed the Judgment. (R., pp.171-173.)

¹ For clarification, this appeal involves issues with count I of the Amended Indictment, which is also reflected as count II in the original Indictment.

ISSUE

Did the district court lack jurisdiction over the subject matter of the charge of sexual abuse of a minor because the law and facts alleged in Count I of the Indictment failed to allege a valid charge under the version of the statute that applies to Mr. Olin's case?

ARGUMENT

The District Court Lacked Jurisdiction Over The Subject Matter Of The Charge Of Sexual Abuse Of A Minor Because The Law And Facts Alleged In Count I Of The Indictment Failed To Allege A Valid Charge Under The Version Of The Statute That Applies To Mr. Olin's Case

A. Introduction

Under the version of the statute defining sexual abuse of a child under the age of sixteen that applies to Mr. Olin's case, it was not a crime to masturbate in the presence of a child. Because the Indictment in this case failed to allege either a legal or a factual basis that constituted a crime with regard to the charge of sexual abuse, the district court lacked subject matter jurisdiction over Count I.

B. The District Court Lacked Jurisdiction Over The Subject Matter Of The Charge Of Sexual Abuse Of A Minor Because The Facts Alleged In The Indictment Failed To Allege A Valid Charge Under The Version Of The Statute That Applies To Mr. Olin's Case

Mr. Olin asserts that, because the Amended Indictment in this case fails to allege that he actually committed the offense of sexual abuse as this crime was defined at the time he was alleged to have committed it, the district court lacked subject matter jurisdiction over this charge and his conviction for Count I, sexual abuse of a minor, should be vacated.

The question of whether the district court lacked subject matter jurisdiction is a question of law that this Court reviews *de novo*. See, e.g., *State v. Jones*, 140 Idaho 755, 757 (2004). Whether an information or indictment conforms to legal requirements is also a question of law that this Court reviews *de novo*. *Id.* The issue of whether the district court had subject matter jurisdiction over a case can be raised at any time, including for the first time on appeal. *Id.* at 758.

“The indictment or information filed by the prosecutor is the jurisdictional instrument upon which a defendant stands trial.” *Id.* at 757. It is the filing of an indictment or information that confers subject matter jurisdiction on the district court with regard to the charges contained therein. *Id.* In light of this, the district court’s subject matter jurisdiction over the charges brought against the defendant is dependent upon the legal sufficiency of the indictment or information containing those charges. *Id.* at 758, 101 P.3d at 702.

However, when the challenge to the sufficiency of the indictment to confer jurisdiction is raised for the first time on appeal, this Court applies a more liberal standard of review in favor of the indictment’s validity. Specifically, the indictment or information will “be upheld unless it is so defective that it does not, by any fair and reasonable construction, charge an offense for which the defendant is convicted.” *Id.* at 759, 101 P.3d at 703 (quoting *State v. Cahoon*, 116 Idaho 399, 400, 775 P.2d 1241, 1242 (1989)).

Under this more liberal standard of review, appellate courts are entitled to construe the factual elements alleged in an indictment or information to include elements that were otherwise omitted from the indictment or information. *State v. Murray*, 143 Idaho 532, 536 (Ct. App. 2006). However, the reviewing court must construe the charging document as written, and if essential elements of the charge are nowhere present in the indictment or information, the charging document fails to confer jurisdiction. *Id.* at 536-537.

In light of this, the Indictment that alleged Mr. Olin had committed sexual abuse of a minor failed to actually allege an offense, as nothing in the State’s Indictment

alleges a crime, either by the statute code section or the facts, which are required to make out a proper charge. The Amended Indictment provides:

JERRY LEE OLIN is accused by the Grand Jury of Kootenai County by this Indictment, of the crimes of COUNT I: SEXUAL ABUSE OF A CHILD UNDER THE AGE OF SIXTEEN YEARS, a Felony, I.C. § 18-1506 (1)(d); . . .

COUNT I

That the Defendant, JERRY LEE OLIN, over the age of eighteen, to-wit: 30 years of age or older, on or between November 2001 and September 2002, in the County of Kootenai, State of Idaho, did induce, cause or permit a minor child, C.A.C., of the age of 9 years to witness an act of sexual conduct, to wit: by masturbating in the presence of said child.

(R., pp.80-81.)

The applicable code section that applies to Mr. Olin's case provides:

(1) It is a felony for any person eighteen (18) years of age or older, with the intent to gratify the lust, passions, or sexual desire of the actor, minor child or third party, to:

(a) solicit a minor child under the age of sixteen (16) years to participate in a sexual act, or

(b) cause or have sexual contact with such minor child, not amounting to lewd conduct as defined in section 18-1508, Idaho Code, or

(c) make any photographic or electronic recording of such minor child.

(2) For the purposes of this section "solicit" means any written, verbal, or physical act which is intended to communicate to such minor child the desire of the actor or third party to participate in a sexual act or participate in sexual foreplay, by the means of sexual contact, photographing or observing such minor child engaged in sexual contact.

(3) For the purposes of this section "sexual contact" means any physical contact between such minor child and any person, which is caused by the actor, or the actor causing such minor child to have self contact.

(4) Any person guilty of a violation of the provisions of this section shall be imprisoned in the state prison for a period not to exceed fifteen (15) years.

I.C. § 18-1506 (2001-2002).

The Grand Jury indicted and the prosecutor amended the indictment charging Mr. Olin under subsection 1(d); that subsection did not exist in 2001 or 2002.² Mr. Olin

² In 2008, the legislature amended I.C. § 18-1506 adding in subsection 1(d) making it a crime to: "Induce, cause or permit a minor child to witness an act of sexual conduct. I.C. § 18-1506 (eff. July 1, 2008). Subsection (4) was modified to define "sexual

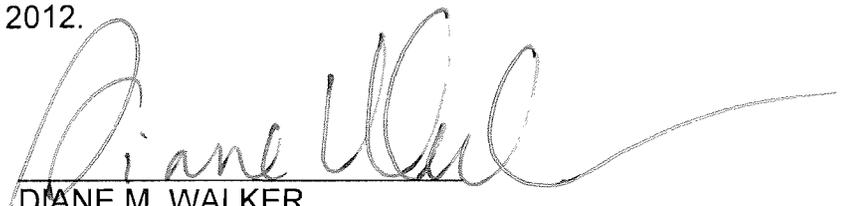
may not be charged with an offense that did not constitute a crime when it was committed. See *State v. Hernandez*, 122 Idaho 227, 229 (Ct. App. 1992) (“Prosecution under the later version of the statute would run afoul of the prohibition against ex post facto laws. With this principle in mind, Hernandez’ charge stemming from incidents occurring in 1985 required prosecution under the 1985 version of I.C. § 18-1506.”).

The most this indictment alleges is that Mr. Olin masturbated in front of C.A.C. in 2001 and/or 2002. (R., pp.80-81.) Because, subsection of I.C. §18-1506(1)(d) did not exist at the time that Mr. Olin was alleged to have committed sexual abuse, and the statute defining the offense did not make the alleged acts a crime, no subject matter jurisdiction existed. In 2001 and 2002, masturbating in front of a child did not constitute the crime of sexual abuse of a child. The Indictment in this case failed to allege that Mr. Olin’s behavior constituted sexual abuse of a child. As such, the Indictment failed to confer subject matter jurisdiction upon the district court for this charge.

CONCLUSION

Mr. Olin respectfully requests that this Court vacate his conviction in Count I.

DATED this 17th day of January, 2012.


DIANE M. WALKER
Deputy State Appellate Public Defender

conduct” which includes human masturbation. I.C. § 18-1506 (2008). Subsection five was added identifying the punishment. *Id.* The legislature increased the maximum punishment in 2006, from 15 years to 25 years. I.C. § 18-1506(2006).

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of January, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JERRY LEE OLIN
INMATE # 69328
ICC
PO BOX 70010
BOISE ID 83707

BENJAMIN R SIMPSON
DISTRICT COURT JUDGE
E-MAILED BRIEF

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EVAN A. SMITH
Administrative Assistant

DMW/eas

