

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA

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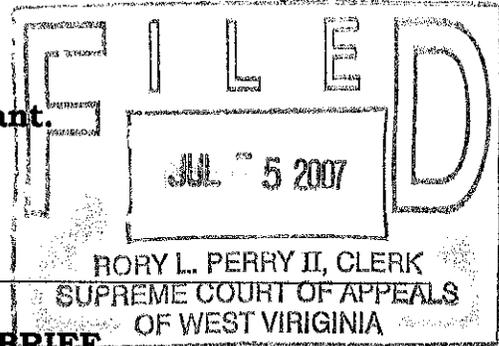
Plaintiff Below/Appellee,

vs:

No. 33300

KENNETH RAY COLLINS,

Defendant Below/Appellant.



APPELLANT'S REPLY BRIEF

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PREFACE

In order to conserve time and space and because Appellant's Counsel is unsure as to whether under Rule 10 of the Rules of Appellate Procedure it is again necessary to publish the Kind of Proceeding and Nature of Ruling in the Circuit Court, Statement of Facts and Points and Authorities, Appellant directs this Honorable Court's attention to his Appellant's Brief which outlines the Kind of Proceeding and the Nature of the Ruling in the Circuit Court. Appellant's Brief also provides a thorough presentation of the Statement of Facts and Points and Authorities relied upon. Appellant requests this Court to review those portions of Appellant's Brief if questions arise concerning Statement of Fact or Assignment of Error.

DISCUSSION OF LAW

NOW COMES THE Appellant, Kenneth Ray Collins, and for this his Reply Brief to the Brief of Appellee, State of West Virginia, states as follows:

THE TRIAL COURT ERRED WHEN IT FAILED TO DIRECT A VERDICT OF ACQUITTAL ON THE CHARGE OF SEXUAL ABUSE BY A CUSTODIAN AT THE CLOSE OF THE STATE'S CASE IN CHIEF, AND ERRED IN SUBMITTING TO THE JURY ANY INSTRUCTIONS ON THAT CHARGE.

The State of West Virginia, in the Brief of Appellee, cleverly argues that the Trial Court did not abuse its discretion when it failed to direct a verdict of acquittal on the charge of sexual abuse by a custodian as the

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State argues that the Appellant was a custodian at the time of the alleged offense. Be it remembered that these alleged offenses occurred in August of 2000. Be it also remembered that the Appellant was tried under the statute which was in effect as of 1998. W.Va. Code 61-8D-5(a) (1998) states:

(a) In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection, as follows: If any parent, guardian or custodian of a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct, or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, then such parent, guardian or custodian shall be guilty of a felony and, upon conviction thereof, shall be imprisoned in the penitentiary not less than ten years nor more than twenty years, or fined not less than five hundred nor more than five thousand dollars and imprisoned in the penitentiary not less than ten years nor more than twenty years.

Counsel for the State of West Virginia in this matter does a good job of trying to convince this Court to focus on the act itself rather than the fact that the Appellant simply did not meet the definition of a custodian under the statute. In other words, Counsel for the State of West Virginia insists that Appellant was a custodian when he took the alleged victim for a four-wheeler ride and was a custodian any time he was in the presence of the alleged victim and no other human being was present.

Appellant submits that to be a custodian and to be convicted under the criminal statute which was in effect at the time of the alleged offense, he would have to be a parent, guardian or custodian of the alleged victim who was under his care, custody or control. Furthermore, be it remembered that the definition of custodian which was in effect at the time of the alleged offenses is defined as follows:

"Custodian" means any person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement, or legal proceeding.

It is very easy for any attorney or any Court to forget the human element of this offense. Even if you believe the State's portion of their argument, isn't it unreasonable for this Appellant to serve a minimum of ten (10) years in prison without the possibility of parole on the question of whether he is actually a custodian. In other words, shouldn't all doubts favor the Appellant in this matter because of the way the statute was worded prior to 2005? Consequently, using the human component of this case, Appellant prays that he be given the benefit of the doubt and that the charge of Sexual Abuse by a Parent, Guardian or Custodian be retried or that the same be dismissed.

The Appellant in this matter again submits to this Court that since the Legislature changed the definition of custodian in 2005 to

include persons in a position of trust, it is logical to conclude that definition was not in effect and did not apply to the Appellant in his trial as Appellant was tried under the 1998 statutes. Consequently, if the Legislature chose to add the definition of a person in a position of trust to a child, this would effectively apply to Appellant if the crime occurred today.

Without rehashing Appellant's brief, the Appellant respectfully asks this Court to consider the following: How does taking an alleged victim for a four-wheeler ride make that person the custodian? Remember, custodian is defined in part as "who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis". Appellant submits that this definition is designed to include parents, step-parents, guardians, etc. and is not intended to include any individual who is otherwise in the presence of the child. Otherwise, why would the Legislature find it necessary to change the definition of 61-8D-5 and extend the definition of custodian in the 2005 statute?

The State of West Virginia argues State v. Potter, 197 W.Va. 734, 478 S.E.2d 742 (1996) supports the Appellant's conviction in this case. Appellant understands that the definition of custodian under the statute

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was the same in his case as it was in State v. Potter. However,

Appellant respectfully reminds this Court of the following:

1. The Potter case involved a seven (7) year old male who had been staying all night with the Defendant and his wife on several occasions. More specifically, the overnight stays had graduated from one (1) night per week to approximately two (2) nights per week; and
2. The Potter case did not involve any challenge to the definition of custodian under the statute. The Assignments of Error in Potter involved challenges to the Defendant's confessions, challenges to the clergy-communicant privilege and challenges to cross-examination regarding the Defendant's beliefs; and
3. The Defendant's conviction in Potter involved three (3) counts of first degree sexual assault and three counts of sexual abuse by a custodian. At no time did the Appellant's counsel argue the definition of custodian.

It should be remembered that, according to the testimony of Samantha Owens (alleged victim), Samantha and her mother were living with the parents of the Appellant at Taylorville, Mingo County, West Virginia, in August of 2000. (Vol. I, Tr. p. 215). Furthermore, according to Samantha, the Appellant did not reside at this residence. (See Vol. I, Tr. p. 215). Further, there is no evidence to indicate that Samantha Owens was placed in the care, custody or control of the Appellant by any party whether it was the Appellant's parents or Samantha's mother. Consequently, the State of West Virginia is requesting this Court to

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define the Appellant as a custodian of Samantha when the Appellant did not live with the victim, was not the legal guardian or custodian of the victim and was simply a friend of the victim when he allegedly took Samantha for a ride on a four-wheeler.

Counsel for the State of West Virginia discusses on more than one occasion in the Brief of Appellee an alleged second event which allegedly occurred when the victim spent the night with the Appellant and his wife Melissa. More specifically, this alleged second crime was discussed in Appellee's Brief on Pages 3, 4, 9 and 10 of what otherwise is an eleven (11) page Brief. Appellant reminds this Court that he was found not guilty of both Counts III and IV of the Indictment which involves the same allegation which opposing Counsel spends so much talking about in his Brief. Appellant respectfully requests this Court to disregard the aforesaid discussions as he was found not guilty of same.

Appellant reminds this Court of the Points and Authorities previously cited in his Appellant's Brief. However, Appellant brings to this Court's attention the following case that was discussed in both Appellee's Brief and the Reply Brief of Appellant.

POINTS AND AUTHORITIES

CASE LAW:

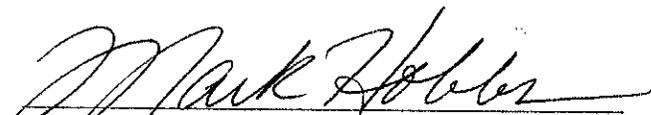
1. State v. Potter, 197 W.Va. 734, 478 S.E.2d 742 (1996).

CONCLUSION

Based upon the above, the Appellant, Kenneth Ray Collins, hereby submits to this Court that sufficient grounds have been established to reverse the jury verdict rendered in this matter on January 12, 2005, and vacate or modify the Sentencing Order entered in the Circuit Court of Mingo County, West Virginia, on February 16, 2005; that the Appellant be granted a new trial on the issue of whether he was a custodian of the alleged victim if the Court determines that such a new trial would not violate double jeopardy principles; that the Appellant be granted such other, further and general relief as this Court deems proper as in duty bound he will ever pray, etc.

Kenneth Ray Collins

By Counsel



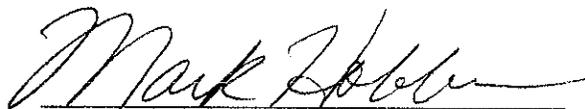
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CERTIFICATE OF SERVICE

I, Mark Hobbs, Counsel for Appellant, do hereby certify that a true and accurate copy of the foregoing **APPELLANT'S REPLY BRIEF** was sent by United States Mail, postage prepaid, to R. Christopher Smith, Assistant Attorney General, Attorney General's Office, 1900 Kanawha Boulevard, East, Room E-26, Charleston, West Virginia 25305-0220, on this the 5th day of July, 2007.



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