

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee,

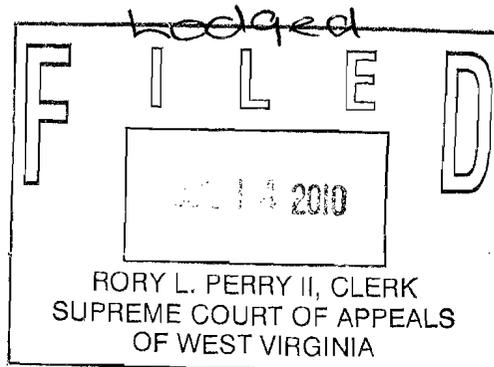
v.

38472
Case Number: ~~35427~~

DONALD L. LONGERBEAM,
Defendant Below, Appellant.

FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

APPELLEE'S RESPONSE AND BRIEF



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Defendant Below, Appellant.**

APPELLEE’S RESPONSE AND BRIEF

Comes now the State of West Virginia (hereinafter “the State”), by and through counsel, Brandon C. H. Sims, Assistant Prosecutor in and for Jefferson County, and hereby files this brief and response to the appeal previously filed.

The Kind of Proceeding and Nature of the Ruling Below

On March 4, 2009, following two days of testimony, Appellant Donald Lee Longerbeam was found guilty of Count 3 of the indictment issued against him in Jefferson County Criminal Action Number 08-F-91. Count Three charged the defendant with Sexual Abuse by a Guardian, a violation of West Virginia Code § 61-8D-5(a). On May 4, 2009, after receiving a Pre-Sentence Investigation prepared by the Probation Department for the Twenty-Third Judicial Circuit, and after hearing presentations of counsel, the victim’s mother, and from the defendant himself, the Court sentenced the defendant to the statutorily-prescribed period of confinement in the penitentiary house of this State for not less than ten nor more than twenty years.

Statement of Facts

In May 2007, the Appellant and his wife were moving out of their home near Ranson, Jefferson County. Appellant's wife wanted to transplant some flowers from her house to her sister's house in Ranson. Appellant's wife testified that her sister's daughter, Marissa G., went on an outing alone with the Appellant to transplant the flowers. March 3, 2009 Tr. 192:21 – 193:6; March 4, 2009 Tr. 21: 8 – 11. When Appellant and Marissa returned they did not have any flowers, but instead had gardening tools. March 4, 2009 Tr. 21: 18 – 22: 1. Less than a month later the police were called from Marissa's home in Ranson.

On June 8, 2007, police responded to a call for assistance in relation to a complaint of sexual abuse in Ranson, Jefferson County. The caller was an adult, Kassandra "Kacy" Mose, who reported that she witnessed her uncle, the Appellant, with his arm around her younger minor sister Marissa G., and that upon being confronted Marissa reported "Donnie's been touching me." Earlier that day, Marissa and Kacy's sister, Taylor, had phoned the Appellant and his wife, Cindy to request the Longerbeams come to assist the children in finding a pet hamster.

When the Appellant and his wife arrived at the children's home they walked in without knocking, as was customary. March 4, 2009 Transcript 23: 21 – 22. That morning Kacy was asleep in the house after working an overnight shift. March 3, 2010 Tr. 183:14 – 23. Upon arrival at the house, the Appellant's wife told the girls to come downstairs, and they complied with her direction. March 4, 2009 Tr.25: 20-22.

Prior to this date Marissa and Taylor had spent the night with their aunt and uncle "quite a few times." March 4, 2009 Tr. 16: 23 – 17: 3. These overnight visits were both on the weekends and during the week, and would sometimes last for one or two nights. March 4, 2009

Tr. 34:22 – 35: 2. The Appellant’s wife testified that there was a usual procedure with an earlier bedtime for school nights that was different from other nights the girls stayed with the Appellant and his wife. March 4, 2009 Tr. 17: 8 – 17. Appellant’s wife also testified that at various times when she was at work, Appellant was alone with Marissa and Taylor. March 4, 2009 Tr. 35: 6 – 8.

At the trial, Marissa testified that on June 8, 2007, the Defendant had been touching her on her breasts, butt, and vagina. March 3, 2009 Tr. 187:19-23. This testimony was corroborated by her older sister Kacy, who testified that she walked out into the living room to see the Defendant with his arm around Marissa and his hand underneath her. March 3, 2009 Tr. 167: 17-18. Marissa also testified that she had been sexually abused by the Defendant on other occasions before June 8, 2007. March 3, 2009 Tr. 194: 1-10. When asked by defense counsel why she didn’t leave the living room on June 8, 2007 if the prior incidents of alleged abuse scared her, Marissa responded that she was scared and froze most of the time. March 3, 2009 Tr. 224: 5-12.

Points and Authorities Relied Upon

West Virginia Statutes

West Virginia Code § 61-8D-1

West Virginia Code § 61-8D-5

Caselaw

McCoy v. VanKirk, 201 W.Va. 718, 500 S.E.2d 534 (1997)

People v. Kaminski, 246 Ill.App.3d 77, 615 N.E.2d 808 (1993)

People v. State of Colorado v. Johnson, 167 P.3d 207 (2007)

Richey v. Indiana, 893 N.E.2d 1181, 2008 WL 4149923 (2008, unpublished disposition)

Shaffer v. Fort Henry Surgical Associates, Inc., 215 W.Va. 453, 458, 599 S.E.2d 876, 881 (2004)

State v. Collins, 221 W.Va. 229, 654 S.E.2d 115 (2007)

Discussion of Law: Response to Petitioner's Assignments of Error

I. THE CIRCUIT COURT CORRECTLY DENIED APPELLANT'S MOTION FOR ACQUITTAL AND/OR NEW TRIAL

A. The Appellant met the definition of a custodian under West Virginia Code § 61-8D-1(4).

The evidence presented at trial demonstrated that both the defendant and his wife were custodians of Marissa at the time of the sexual contact. West Virginia Code § 61-8D-1 defines a custodian as

a 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. "Custodian" shall also include , but not be limited to, the spouse of a parent, guardian or custodian, or person cohabitating with a parent guardian or custodian in the relationship of husband and wife, where such spouse or other person shares actual physical possession or care and custody of a child with the parent, guardian or custodian. (emphasis added.)

The Defendant essentially argues that because another custodian, Marissa's sister Kacy, was present in the house, the Defendant and his wife were precluded from acting as custodians of Marissa and her sisters. However, nothing in the statute prevents a child from having multiple custodians at any one time. In fact, the statute specifically defines a custodian as someone who "shares physical possession, care and custody of a child," indicating that it is possible to have more than one custodian at a time.

Furthermore, this Court has indicated that it is possible for an individual to voluntarily become the custodian of the child even when other legal custodians are present. In *State v. Collins*, the Defendant took a child on a four wheeler ride away from the house where her mother was living. The victim's mother was at the house at the time he took her on the ride. The Defendant argued that at the time he was not her custodian, but rather simply a person who took

the victim on a four-wheeler ride. However, the Court rejected this argument and stated that the Defendant became a voluntary, temporary custodian when he took the victim on a four wheeler ride.

While Marissa's older sister testified that she was in charge of her sisters, the evidence is clear that Mrs. Longerbeam and her husband also acted as custodians on the day in question. Mrs. Longerbeam, who is Marissa's aunt, testified that Marissa's younger sister, Taylor, called her to the house on June 8 for help, instead of waking Kacy whom the Defendant alleges was also a custodian on June 8. Taylor informed Mrs. Longerbeam that a hamster was loose and asked her to come and help them catch the hamster, and Mrs. Longerbeam indicated that she would come over to assist them when she was finished at Wal-Mart. When Ms. Longerbeam arrived at the house with the Defendant, she and her husband entered without knocking and acted as the custodian by giving direction to the children. Mrs. Longerbeam asked them to come downstairs, and the children, including Marissa, complied with her directions to them. Furthermore, Kacy, who was supposed to be in charge, testified that she was sleeping at the time that the Defendant and his wife arrived at the house, and that she wasn't watching the kids at the time. Finally, the Defendant, who arrived at the house with his wife, was the only adult in the room with Marissa when they arrived at the home to assist the children who called them for help. Similar, to the Defendant in *Collins*, the Longerbeams voluntarily became the custodians of the Marissa and her sisters when they arrived at the house to respond to the childrens' request for help.

B. The Appellant was a person in a position of trust under West Virginia § 61-8D-1(12).

The testimony at trial also indicated that the Defendant was a person in a position of trust to the victim.

A “person in position of trust in relation to a child” refers to any person who is acting in the place of a parent and charged with any of a parent’s rights, duties or responsibilities concerning a child or someone responsible for the general supervision of a child’s welfare, or any person by virtue of their occupation *or position* is charged with any duty or responsibility for the health, education, welfare or supervision of a child.

W.Va. Code § 61-8D-1(12) (emphasis added.)

Courts throughout the country have indicated that a familial relationship is an important factor in determining whether the defendant was in a position of trust with the victim. In Illinois, the Courts have ruled that a familial relationship is relevant when determining whether a defendant possessed supervision over the victim. In *People v. Kaminiski*, the victim had only known the defendant for a little over a year, and on the night in question, she obtained permission from her parents and her sister, Roberta, to spend the night with her sister and the Defendant. The defendant argued that he “merely acquiesced to an overnight stay” when his wife invited her seventeen year old sister to spend the night at their house. The Court rejected this argument, ruling that, “[w]hen all of the facts and circumstances are viewed in the light most favorable to the prosecution, an inference arises, *considering particularly the familial relationship of the parties involved*, that both the Defendant and Roberta were responsible for looking after the welfare of the victim that night.” *People v. Kaminski*, 246 Ill.App.3d 77, 615 N.E.2d 808, 813 (1993).

Indiana has also indicated that familial relationships are sufficient to establish a position of trust. During the sentencing of the Defendant in *Richey v. Indiana*, the circuit court stated that

it felt the Defendant had “violated a position of trust in that he was-he knew [the] young lady through family, because, as he stated, [her] mother, I believe married your uncle.” The Appellate Court upheld the trial court’s ruling. To the extent that the trial court relied upon the Defendant’s position of trust as an aggravating factor “it appears that Richey [the defendant] and the victim knew each other through relatives who ultimately married, suggesting, their relationship was not too attenuated to create such a position of trust.” *Richey v. Indiana*, 893 N.E.2d 1181, 2008 WL 4149923, (2008, unpublished disposition).

The evidence suggests that the Defendant was in a position of trust with regard to the victim. He was married to Marissa’s aunt. In addition, the Defendant’s wife testified that Marissa and her sisters spent the night at she and the Defendant’s home on several occasions, and that the Defendant was alone with the children whenever she went to work. Furthermore, Marissa testified that she accompanied the Defendant alone on at least one occasion to go get some flowers at the Defendant’s house. The victim testified that only she and the Defendant went to the house. She further testified the her aunt and her family encouraged her to go to the house alone with the Defendant, and in fact indicated that she was instructed to go rather than asked to go with the Defendant. As such, on several occasions, the defendant was responsible for the general supervision of Marissa by virtue of his position within the family and his actions when he was the sole adult responsible for her supervision and general welfare.

The situation was no different on June 8, when the sexual misconduct occurred, and the evidence indicates that the Defendant was in a position of trust in relation to Marissa on that date as well. He was her uncle who supervised her on several occasions. On June 8, the Defendant and Marissa’s aunt arrived at the house after having been called there by the victim’s younger sister to assist them. Marissa’s aunt went upstairs and left Marissa alone with the Defendant, who

had supervised her before. There is no evidence to suggest that the Defendant would not have occupied the same position of trust by virtue of his position than he had on any other occasion when he was alone with Marissa. Accordingly, there was sufficient evidence for the jury to find that the Defendant occupied a position of trust at the time of his sexual misconduct.

C. The evidence showed that the victim, Marissa G., was under the Appellant's care, custody or control at the time of the sexual abuse.

The Defendant argues that the Defendant had to be in a position of trust at the time of the sexual misconduct because the statute requires the victim to be under his care, custody, or control. West Virginia Code § 61-8D-5 provides in relevant part:

If any parent, guardian or custodian of or other person in a position of trust in relation to a child under his or her care, custody or *control*, shall engage 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 the parent, guardian, custodian or person in a position of trust shall be guilty of felony, and upon conviction thereof, shall be imprisoned in the penitentiary not less than ten nor more than twenty years, or fined not less five hundred nor more than five thousand dollars and imprisoned in the penitentiary not less than ten years nor more than twenty years.

W.Va. Code § 61-8D-5(a) (emphasis added.)

The Defendant argues that the phrase “in relation to a child under his or her care, custody or control,” which phrase follows person in a position of trust indicates that the victim must have been under the Defendant's care, custody or control at the time of the sexual abuse. However, the Defendant's interpretation renders the 2005 amendment which added “person in a position of trust” to the statute superfluous. In 2005, the legislature expanded the provisions of W.Va. Code

§ 61-8D-5 to include persons in position of trust in addition to parents, guardians, and custodians. However, under the Defendant's argument a "person in position of trust" has the exact same definition and requirements as a parent, guardian or custodian and the amendments have no effect on the statute. "In construction of legislative enactment, intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from general consideration of act or statute in its entirety." *McCoy v. VanKirk*, 201 W.Va. 718, 500 S.E.2d 534 (1997). The defendant's interpretation mandates that a person in a position of trust also have "care and custody" at the time the abuse occurs. However, this is the exact definition the legislature has given to one who is considered a custodian. In order to be considered a custodian one must have "care and custody of a child on either a full time or temporary basis." W.Va. Code § 61-8D-1(4). Clearly, the legislature did not intend to add a meaningless amendment to the West Virginia code. In fact, it is clear that the legislature intended to expand the instances in which a person who engaged in sexual abuse with a child would receive an enhanced sentence.

It is more plausible that the Legislature intended the addition of the position of trust to apply to those defendants who gain access to victims by virtue of their position of trust and then exploit the relationship to commit the sexual misconduct. The statute does not require the Defendant to be in a position of trust at the time of the act. Rather, the Legislature intended to provide the manner in which one gains a position of trust in relation to a child. Thus, a person gains a position of trust when a child is "under his or her care, custody, or control," and the defendant later exploits that trust to gain access to the victim. Any other interpretation renders the addition of "a person in a position of trust in relation to a child" meaningless.

Other courts have recognized the merit of this argument. “The ability of individuals who hold positions of supervision to exert undue influence over a child is certainly a relevant factor. While we agree that this is one purpose served by the statute, we also recognize that it is the position of “trust, authority or supervision” which often provides a heightened opportunity for the sexual assault to occur.” *People v. Kaminski*, 248 Ill. App3d 77, 82 (Illinois, 1993).

The State argued this exact premise in *People of the State of Colorado v. Johnson*, 167 P.3d 207 (2007). The Colorado Court of Appeals rejected this argument based upon statutory construction of two phrases which are not contained in the West Virginia definition. The Colorado definition of “person in a position of trust” is very similar to West Virginia’s definition. However, the definition in the Colorado statute differs in two respects: 1) it contains the phrase “no matter how brief” and 2) it also contains the phrase “at the time of the unlawful act.” These differences were instrumental to the Colorado Court’s rationale. The Court there ruled that

the description of duties that give rise to a position of trust is modified by the phrase ‘no matter how brief.’ Therefore the legislature clearly contemplated an end to the person’s activities would qualify him or her as being in a position of trust. Second, the phrase ‘at the time of the unlawful act’ occurs at the end of the sentence and is set off by a comma, thereby modifying all the preceding language. Therefore, the legislature intended to limit the “position of trust” designation to situations where the unlawful act occurred while the actor was charged with the statutorily enumerated duties and responsibilities”
Id. at 209.

West Virginia’s definition does not contain any words that contemplate an end to a person holding a position of trust. In addition, the West Virginia definition does not require that the position of trust status exist at the time of the illegal conduct. It is also important to note that the Colorado statute criminalizes the conduct based purely upon a position of trust, and unlike West

Virginia, does not contain separate language addressing a custodian. C.R.S.A. § 18-3-405.3.

Because the position of custodian is not a separate element, the Colorado Court's interpretation discussed above is very similar to West Virginia's definition of a custodian. Accordingly, West Virginia's definition of a person in a position of trust must necessarily differ substantially to give meaning the expanded definitions in W.Va. Code 61-8D-5. Accordingly, the argument that a person in a position of trust is meant to apply to defendants who are able to exploit their position of trust with the victim is applicable under the provisions of the West Virginia Code.

However, if the Court determines that the Defendant must have been acting as a person in position of trust at the time of the sexual abuse, there is sufficient evidence for the Court to find that the victim was under the "care, custody or control" of the Defendant. The West Virginia Code does not provide definitions of care, custody or control in W.Va. Code § 61-8D-1. "[I]n the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning." *Shaffer v. Fort Henry Surgical Associates, Inc.*, 215 W.Va. 453, 458, 599 S.E.2d 876, 881 (2004). The relevant definition of "control" set forth by Merriam-Webster Online (www.m-w.com) is: to exercise restraint or directing influence over; to have power over. The relevant definition of control as found on dictionary.com is: to exercise restraint or direction over; dominate; command.

The evidence is clear that the Defendant exerted this type of control over Marissa on June 8, 2007. Defense counsel asked Marissa why she didn't get up and go upstairs if she was scared of the Defendant. Marissa answered that, "I can't remember. It made me scared I just like froze most of the time." March 3, 2009 Tr. 224: 11-12. Clearly, the Defendant was using his position of trust to influence the victim. The fear she felt paralyzed and restrained her so that she could not run away and avoid the abuse of her uncle. Under the plain meaning of control, the

Defendant, a person in position of trust to Marissa, was clearly exerting control over her at the time the sexual abuse occurred.

II. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY IN REGARD TO THE VERDICT FORM

The Trial Court correctly instructed the jury on all definitions and aspects of W.Va. Code § 61-8D-5(a). The Court informed the jury that it was never alleged that the Defendant was the legal guardian of the victim. In addition, the Trial Court provided for the jurors the definitions of each of the elements contained in W.Va. Code § 61-8D-5(a). Accordingly, the Court defined separately for the jurors 1) a custodian, 2) guardian, and 3) a person in position of trust in relation to a child. These instructions did not deviate from the definitions provided in the Code.

REQUEST FOR RELIEF

WHEREFORE, for all the reasons cited hereinabove, the State does hereby request that the Supreme Court of Appeals does affirm the ruling of the Circuit Court.

Respectfully submitted,
STATE OF WEST VIRGINIA

By counsel:



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CERTIFICATE OF SERVICE

I, Stephanie F. Grove, Assistant Prosecutor for Jefferson County, West Virginia and counsel for the Respondent do hereby certify that on this 12th day of July, 2010, I have placed a true copy of the foregoing, "Appellee's Response and Brief" in the United States Mail to:

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