2017 IL App (4th) 150424-U

NO. 4-15-0424

FILED
September 20, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Clark County
JUSTIN L. SWITZER,	)	No. 13CF89
Defendant-Appellant.	)	
	)	Honorable
	)	Tracy W. Resch,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court vacated defendant's conviction for criminal sexual abuse, finding it was not a lesser-included offense of aggravated criminal sexual abuse.

¶ 2 In November 2013, the State charged defendant, Justin L. Switzer, with one count of aggravated criminal sexual abuse. In January 2014, defendant filed a motion to suppress, which the trial court granted in part and denied in part. In March 2015, the court found defendant guilty of criminal sexual abuse. In May 2015, the court sentenced him to 364 days in jail.

¶ 3 On appeal, defendant argues the trial court erred in (1) failing to suppress evidence and (2) finding him guilty of criminal sexual abuse. We vacate defendant's conviction.

¶ 4 I. BACKGROUND

¶ 5 In November 2013, the State charged defendant by information with one count of

aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2012)), alleging he knowingly committed an act of sexual penetration with Jane Doe, who was at least 13 years of age but under 17 years of age, in that he placed his penis in her vagina and he was at least five years older than her. Defendant pleaded not guilty.

¶ 6 In January 2014, defense counsel filed a motion to suppress evidence. Therein, counsel stated Clark County sheriff's deputy Michael Duvall arrested defendant on October 27, 2013, on drug-related charges. During a frisk of defendant's person, Duvall discovered a cell phone. Subsequent to defendant's arrest, Duvall discovered text messages suggesting defendant may have committed the offense of aggravated criminal sexual abuse. After receiving warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), defendant confessed to the sex crime. The motion stated defendant had a legitimate expectation of privacy in the contents of his phone and did not consent to a search of the phone. The motion argued any admission by defendant and any evidence obtained from the alleged victim constituted fruit of the poisonous tree. The motion asked that all text messages, statements by defendant, and evidence obtained from the alleged victim be suppressed.

¶ 7 In March 2014, the trial court conducted a hearing on the motion to suppress. Deputy Duvall testified he was dispatched to a traffic accident, and eventually arrested defendant for manufacture and delivery of cannabis after finding marijuana, two digital scales, and plastic bags in a backpack. Duvall removed a cell phone from defendant's pocket and transported him to the jail. Duvall then left to go to a Terre Haute hospital to investigate the driver involved in the traffic accident. Upon his return approximately three hours later, Duvall examined the evidence, including the cell phone. When he looked at the phone, Duvall found evidence of a possible sex crime, including texts between defendant and a juvenile regarding sexual

intercourse. Prior to viewing the contents of the phone, Duvall had not received any information that defendant may have committed a sex crime.

¶ 8 Defendant testified no one asked for his permission to search his cell phone. On cross-examination, defendant admitted he was on probation for possession of cannabis and one of the conditions of his probation was that he could not possess a cell phone.

¶ 9 In a docket entry, the trial court denied the motion to suppress. The court found the search of the contents of the cell phone was a lawful search incident to defendant's arrest on drug charges and no warrant was required.

¶ 10 In June 2014, defense counsel filed a motion to reconsider the suppression ruling, relying on the United States Supreme Court's decision in *Riley v. California,* 134 S. Ct. 2473 (2014), which held the search-incident-to-arrest exception does not apply to cell phones, absent exigent circumstances. The motion asked that all text messages, statements by defendant, and evidence obtained from the alleged victim be suppressed as fruit of the poisonous tree.

¶ 11 In October 2014, the trial court entered an order regarding the suppression of evidence. Citing *Riley,* the court found the warrantless search of defendant's cell phone incident to his arrest was improper and suppressed the digital evidence found therein. The court, however, found the fruit-of-the-poisonous-tree doctrine should not be applied retroactively to bar the testimony of the alleged victim.

¶ 12 Thereafter, defense counsel filed a motion to suppress the testimony of the alleged minor victim. Counsel argued the State failed to prove (1) the identity of the alleged victim and (2) her statements were obtained by means sufficiently distinguishable from exploitation of the illegal search. Counsel also filed a motion to suppress defendant's confession, stating defendant made inculpatory statements to Duvall only after being confronted with evidence of the crime

that Duvall had obtained as a result of the illegal search of defendant's cell phone.

¶ 13 In December 2014, the trial court conducted a hearing on defendant's motions. The State argued Jane Doe still had the authority to disclose the alleged incident, and it was "probably very likely or could be very likely that she would have" so it was "probably inevitable" that the incident would have been disclosed "at some point." The court granted the motion to suppress defendant's confession. However, the court denied the motion to suppress Jane Doe's testimony, finding (1) no clear legal authority dictating a minor victim's testimony should be suppressed; (2) Duvall's conduct in searching the phone was made in good faith; and (3) the "minor victim's testimony in circumstances of this case should not be suppressed."

¶ 14 In January 2015, the trial court conducted a bench trial. The parties entered a stipulation, which stated if Jane Doe was called as a witness, she would testify defendant committed an act of sexual penetration with her on October 25, 2013. The stipulation also stated Jane Doe was born in April 2000. The State called Deputy Duvall and unsuccessfully attempted to elicit testimony from him regarding defendant's date of birth. Josh Dudley, a correctional officer, testified he was the booking officer on duty on October 26, 2013, when defendant was brought in for processing. At that time, defendant indicated his date of birth was April 12, 1994. Defendant exercised his right not to testify.

¶ 15 Following closing arguments, the trial court noted neither party asked the court to consider a lesser-included offense. The court asked the parties to submit authority as to whether the trier of fact could find a defendant guilty of a lesser-included offense at a bench trial. Both parties filed responses, agreeing the trier of fact in a bench trial has the authority to find a defendant guilty of a lesser-included offense. Defense counsel, however, argued defendant could not be convicted of a lesser-included offense in this case because the charging instrument alleged

defendant was of an age "that is completely inconsistent with the age required to convict him of misdemeanor criminal sexual abuse."

¶ 16 In a March 9, 2015, docket entry, the trial court found defendant guilty of criminal sexual abuse (720 ILCS 5/11-1.50(c) (West 2012)). On March 30, 2015, defendant filed a motion to clarify the record, asking the court to enter an express acquittal on the original charge of aggravated criminal sexual abuse and an express ruling as to whether criminal sexual abuse is a lesser-included offense of aggravated criminal sexual abuse. The court denied the motion.

¶ 17 In April 2015, defense counsel filed a motion for judgment notwithstanding the verdict. Therein, counsel argued criminal sexual abuse was not a lesser-included offense of aggravated criminal sexual abuse under the facts of this case and the State's evidence failed to support a conviction for criminal sexual abuse. The trial court denied the motion.

¶ 18 In May 2015, the trial court entered a written order sentencing defendant to 364 days in jail with credit for 182 days spent in custody. The court also ordered defendant to have no contact with the victim until she turns 18 and required him to register as a sex offender. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues the trial court erred in finding him guilty of criminal sexual abuse because the crime is not a lesser-included offense of aggravated criminal sexual abuse. We agree, and the State concedes.

> "A defendant in a criminal prosecution has a fundamental due process right to notice of the charges against him. [Citation.] For this reason, a defendant may not be convicted of an offense he

> has not been charged with committing. [Citations.] A defendant may, however, be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument [citation], and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense." *People v. Kolton*, 219 Ill. 2d 353, 359-60, 848 N.E.2d 950, 954 (2006).

¶ 21 Our supreme court has held "the charging instrument approach applies when determining whether an uncharged offense is a lesser-included offense of a charged offense." *People v. Kennebrew*, 2013 IL 113998, ¶ 32, 990 N.E.2d 197. Under this approach, a defendant can be convicted of an uncharged offense if two conditions are met: (1) "the description of the greater offense contains a 'broad foundation' or 'main outline' of the lesser offense"; and (2) the evidence adduced at trial "rationally supports a conviction on the lesser offense." *Kolton*, 219 Ill. 2d at 361, 848 N.E.2d at 955.

> "[U]nder the charging instrument approach, whether a particular offense is 'lesser included' is a decision which must be made on a case-by-case basis using the factual description of the charged offense in the indictment. A lesser offense will be 'included' in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred." *Kolton*, 219 Ill. 2d at 367, 848 N.E.2d at 958.

"Whether an offense is a lesser-included offense of a charged crime is an issue of law that we review *de novo*." *Kennebrew*, 2013 IL 113998, ¶ 18, 990 N.E.2d 197.

¶ 22 In the case *sub judice*, the State charged defendant with the offense of aggravated criminal sexual abuse, which included the element that defendant be at least five years older than the victim. 720 ILCS 5/11-1.60(d) (West 2012). The trial court found defendant guilty of the uncharged offense of criminal sexual abuse under section 11-1.50(c) of the Criminal Code of 2012 (720 ILCS 5/11-1.50(c) (West 2012)), which requires the victim be at least 13 years of age but under 17 years of age and the defendant be less than 5 years older than the victim. As defendant was charged with aggravated criminal sexual abuse, which required he be at least five years older than the victim, the crime he was convicted of, criminal sexual abuse, contained an element that is the exact opposite of the element in the charging instrument, *i.e.*, that he be less than five years older than the victim. The greater offense in this case cannot arguably contain a "broad outline" of the lesser offense when one of the elements is in direct contradiction in each offense. Thus, the court erred in finding the offense of criminal sexual abuse was a lesser-included offense in this case.

¶ 23 Moreover, the evidence presented at trial could not rationally support a conviction on a lesser-included offense of criminal sexual abuse. The only evidence of defendant's age established his birth date was April 12, 1994. The stipulation indicated the victim was born in April 2000. Thus, the evidence demonstrated defendant was at least five years older than the victim. Nothing in the record suggested defendant was less than five years older than the victim, which was a required element of the offense of criminal sexual abuse. Accordingly, defendant was improperly convicted of the uncharged offense of criminal sexual abuse that was not a lesser-included offense of aggravated criminal sexual abuse. We therefore vacate defendant's

conviction. Although both parties make arguments on the court's ruling pertaining to the motion to suppress evidence, we find, given the vacatur of defendant's conviction, any opinion on the suppression issue would be advisory and decline to address it. See *In re Alfred H.H.*, 233 Ill. 2d 345, 351, 910 N.E.2d 74, 78 (2009) (stating Illinois courts "do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided").

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we vacate defendant's conviction.

¶ 26 Vacated.