

IN THE COURT OF APPEALS 03/25/97
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00599 COA

STATE OF MISSISSIPPI

APPELLANT

v.

PAM WALTERS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

CHARLES GRAY BURDICK

ATTORNEY FOR APPELLEE:

DAVID M. RATCLIFF

DISTRICT ATTORNEY: JEANNENE T. PACIFIC

NATURE OF THE CASE: CRIMINAL: CONTRIBUTING TO THE DELINQUENCY OF A
MINOR

TRIAL COURT DISPOSITION: DIRECTED VERDICT OF ACQUITTAL GRANTED

EN BANC

McMILLIN, P.J., FOR THE COURT:

This case comes before the Court in a somewhat unusual posture. It is an appeal by the State, questioning the trial court's decision to direct a verdict for the defendant, Pam Walters, at the conclusion of the State's case-in-chief. The State concedes that the prosecution of Walters was finally concluded by the trial court's action, but seeks a determination, for future guidance on the subject, that the trial court committed an error of law in reaching its decision. The State brings this appeal under section 99-35-103(b) of the Mississippi Code of 1972, which provides that:

The state . . . may prosecute an appeal from a judgment of the circuit court in a criminal cause . . . [f]rom a judgment actually acquitting the defendant where a question of law has been decided adversely to the state . . . ; but in such case the appeal shall not subject the defendant to further prosecution, nor shall the judgment of acquittal be reversed, but the Supreme Court shall nevertheless decide the question of law presented.

Miss. Code Ann. § 99-35-103(b) (1972).

I.

The Facts

Walters was indicted for four counts of contributing to the delinquency of a minor. *See* Miss. Code Ann. § 97-5-39(1). She was tried on two of the four counts in this proceeding. Essentially, the allegations underlying the indictment were that Walters had permitted teen-aged students of both sexes, all under the age of eighteen years, to visit overnight in her home and engage in sexual acts with her consent and encouragement. The two counts on which she was tried accused her of contributing to the delinquency of a male and a female minor who were alleged to have been sexual partners on the night in question. The charging language of the count for the female alleged the minor to be "of previous chaste character," and the charging language of the count for the male alleged that he had engaged in sex with a minor "of previous chaste character." It is the trial court's interpretation of the legal meaning of this phrase that prompted this appeal.

II.

The Question of Law Urged by the State

The State was apparently convinced that, in order to properly charge the offense of contributing to the delinquency of a minor, it had to prove that (1) the minor was engaged in an act that, had the minor been an adult, would have constituted a crime, and (2) that the defendant encouraged or

assisted the minor to commit the illegal act. On that theory, the State attempted to frame the indictment to allege that these minors violated this State's statutory rape law. The statute prohibits a person over the age of 18 years from having sexual intercourse with a person of the opposite sex between the ages of 14 years and 18 years *of previous chaste character* without regard to whether the sex was consensual. *See* Miss. Code Ann. § 97-3-67 (1972). The State's theory was, apparently, that these minors were involved in acts that would have constituted a criminal violation of this statute had the male minor been over eighteen years of age, and that Walters had contributed to the violation by providing a place for the activities and by offering her encouragement.

The trial court, at the close of the State's case, directed a verdict for Walters on the ground that the female minor had admitted to a prior act of oral sex with her partner. This led the trial court to conclude that the minor was not "of previous chaste character" as charged in the indictment, and that the State had, therefore, failed to prove an essential element of the crime.

The State has appealed, seeking an adjudication that the previous chaste character of an individual for purposes of the statutory rape statute must be determined by previous acts of sexual intercourse, not by other sexual behavior.

III.

An Issue of Law Does Not Exist

We find, however, that the State failed to present a question of law within the meaning of section 99-35-103(b). The case against Walters, in the opinion of this Court, failed at a more fundamental level than the one seized upon by the trial court to direct an acquittal. As a result, we conclude that questions involving the meaning of the phrase "of previous chaste character" in the statutory rape law are not properly before the Court in this case.

A.

The Count Involving the Female

The indictment count involving the minor female fails to charge a crime under the State's theory of the case. Taking everything as alleged in the indictment to be true, the proof would establish only that the minor was the victim of a statutory rape. Being the victim of a crime does not transform a minor into a delinquent. Had the defendant assisted some minor in robbing this young girl, the defendant might have contributed to the delinquency of the robber, but she would not have contributed to the delinquency of the victim. The same considerations apply to the charge in this indictment.

B.

The Count Involving the Male

The count involving the minor male is also fatally defective insofar as it attempts to charge conduct in violation of the statutory rape law since it leaves out the necessary allegation that the victim was younger than the perpetrator. *See* Miss. Code Ann. § 97-3-67 (1972). There is a further difficulty presented in dealing with this count. It necessarily presents an issue unresolved in Mississippi as to whether such conduct by one under the age of eighteen years, even if proven, is a delinquent act. At least one other state has concluded that it is not. In *In re J.P.*, 287 N.E.2d 926 (Ohio 1972), the court held that a sixteen year old male could not be adjudicated delinquent for engaging in sexual intercourse with a fifteen year old under a statute prohibiting a person eighteen or older from carnally knowing a female under sixteen. The Ohio court held that it was impossible for a sixteen year old to fit into the class of persons subject to the statute. *Id.* at 927. Before this Court could properly reach the question presented in this appeal, we would have to resolve this threshold question, which was neither raised nor argued.

The defendant was not charged under the statutory rape statute, but was charged with contributing to the delinquency of a minor. We have, for the reasons given, found that the State failed to invoke this State's statutory rape statute in either count under which Walters was tried.

It may well be that it was unnecessary to charge the minors with committing an offense under the statutory rape law, and that merely providing a location for these minors to freely engage in sexual activities was sufficient to make a case of contributing to their delinquency. However, if that is the case, the previous sexual experience of the participants was irrelevant since a corrupt minor may certainly be subjected to further corruption at the hands of an adult, and proof of the minor's previous transgressions would not constitute a defense to a charge of contributing to the minor's delinquency. Thus, the State's election to include a factual allegation concerning the sexual history of one of the minors becomes, under this theory, nothing more than an unnecessary impediment to a conviction. The fact that the phrasing of the allegation was borrowed from an unrelated criminal statute does not invoke this Court's authority to answer a hypothetical question of how the phrase ought to be interpreted in the lending statute.

Therefore, this appeal is dismissed as not properly presenting the question of law for which the State seeks an answer.

THE APPEAL BY THE STATE OF MISSISSIPPI IS DISMISSED AND THE COSTS OF THE APPEAL ARE TAXED TO JONES COUNTY.

BRIDGES, C.J., THOMAS, P.J., DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. COLEMAN, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY PAYNE, J. PAYNE, J., CONCURS WITH SEPARATE WRITTEN OPINION. HERRING, J., NOT PARTICIPATING.

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PAYNE, J., CONCURRING:

I concur with Judge Coleman about moral chastity, but I do not believe that the standard for "contributing to the delinquency of a minor" requires the acts done by the minor to constitute a crime. In fact, one would hope that such an adult's activities would be halted before the minor becomes delinquent. Therefore, I believe that all this discussion about the chaste character, or lack thereof, of the minor is unnecessary in determining the criminality of the defendant's actions.

The majority is right that we do not have either issue before us, but I do not want us to leave the impression that we agree with the lower court's interpretation of what constitutes the offense of "contributing to the delinquency of a minor," namely, assisting the minor in the commission of a crime. For example, truancy is not a crime committed by a child. The crime according to Mississippi Code Section 37-13-91(5) is a parent's neglect to see that the child is in school. However, I know of no one who would deny that convincing a child to stay out of school leads to the delinquency of a minor. By the same token, it is my view that providing a place for immoral activities to be done, away from the watchful eye of and without the permission of parents, could certainly contribute to the delinquency of minors.

I recognize this is not the issue to be addressed by our opinion, but since the appeal was taken to give guidance to prosecutors in the future, I want there to be no doubt about what we are *not* saying to prosecutors in regard to "contributing to the delinquency of a minor."

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COLEMAN, J., CONCURS:

I agree with the majority that the trial court's directing a verdict of acquittal for the Appellee, Pam Walters, should be affirmed; but I write this concurring opinion because I am content to accept the trial judge's reason for his having directed the verdict of acquittal. In *Allgood v. Bradford*, 473 So. 2d 402, 411 (Miss. 1985), the Mississippi Supreme Court explained:

Where a popular word used in a statute is given no statutory definition, that word must be accepted in its popular sense, and the Court must attempt to glean from the statute the legislative intent. *Lambert v. Ogden*, 423 So.2d 1319 (Miss.1982).

The American Heritage Dictionary of the English Language defines "chaste" as "Morally pure in thought or conduct; decent and modest." *The American Heritage Dictionary of the English Language*, p. 324 (3d ed. 1992). Thus, I agree with the trial judge's determination that a fourteen-

year-old female who admits to having engaged in oral sex with her male companion is hardly "[m]orally pure in thought or conduct; decent and modest."

PAYNE, J., JOINS THIS SEPARATE WRITTEN OPINION.