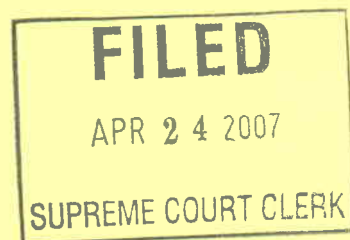

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2005-SC-862-MR

DAVID A. CLARK — APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
v. HON. JANET P. COLEMAN, JUDGE
INDICTMENT NO. 03-CR-00311

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Brief for Appellant has been mailed, postage prepaid, to Hon. Janet P. Coleman, Judge, Hardin Circuit Court, Hardin County Justice Center, 120 E. Dixie Ave., Elizabethtown, KY 42701-1487; Hon. Chris Shaw, Commonwealth Attorney, P.O. Box 1146, Elizabethtown, KY 42702-1146; Hon. Francis L. Holbert, Asst. Public Advocate, DPA, P.O. Box 628, Elizabethtown, KY 42702; and Hon. Greg Stumbo, Attorney General, Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, on April 16, 2007. I hereby further certify that the record had not been checked out from the Supreme Court of Kentucky for the purpose of this reply brief.

Emily Holt Rhorer

PURPOSE

The purpose of this reply brief is to respond to the Appellee's arguments that require a response. The failure to address a particular issue should not be taken as a reflection that Appellant believes the issue has no merit or less merit than issues that have been addressed in this reply brief.

ARGUMENT

II. CONVICTIONS FOR BOTH PROMOTION OF A SEXUAL PERFORMANCE OF V.P. AND USE OF V.P. IN A SEUXAL PERFORMANCE VIOLATED DOUBLE JEOPARDY PROHIBITIONS.

The question for this Court is whether Mr. Clark can be found guilty of both promotion of a sexual performance of a minor and use of a minor in a sexual performance when one minor is involved in one instance of alleged sexual activity.

The Appellee argues that the promotion statute, KRS 531.320(1), requires proof that a "person produce, direct, or promote a sexual performance" involving a minor, while the use of a minor in a sexual performance statute, KRS 531.310(1), requires proof that a "person employ, consent to, authorize, or induce a minor to engage in a sexual performance." Appellee's Brief, 7 Appellant submits that while the words are different, the intent is the same, and there is no real difference between these two statutes.

The elements of the two offenses bear great similarity, and each statute does not appear to require proof of a fact that the other does not. The instructions utilized by the trial court also do not seem to require proof of a fact that the other does not. For example, the use of a minor in a sexual performance count involving V.P. required the jury to find Mr. Clark "knowingly authorized or induced V.P. to engage in or consented to V.P.'s engagement in a sexual performance." TR 2 127 The promotion count involving V.P. required the jury to find Mr. Clark "knowingly produced, directed, or promoted a performance which included sexual conduct by V.P." Id., 125 The terms "authorizes," "induces," and "consents" seem to have the same meaning as "produced," "directed," and "promoted."

Furthermore, KRS 505.020(1) provides in part, "When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when: (a) One offense is included in the other, as defined in subsection (2)." KRS 505.020(2) provides in pertinent part, "An offense is so included when: (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged." In this case, the same facts established the commission of both promotion of a sexual performance of a minor and use of a minor in a sexual performance—V.P. allegedly "humped" M.C.

This Court should vacate one of these convictions.

III. JURY INSTRUCTIONS ON COUNTS 27 AND 30 OF THE INDICTMENT ALLOWED THE JURY TO CONVICT MR. CLARK OF OFFENSES NOT SO CHARGED IN THE INDICTMENT.

Mr. Clark conceded this issue was not preserved in his original brief at page 18. It is hard to imagine that this would not be palpable error, RCr 10.26, as two illegal convictions and sentences have resulted. This, Mr. Clark believes, violates his due process rights. Martin v. Commonwealth, 207 S.W.3d 1 (Ky. 2006), cited by Appellee in its brief, pg. 9.

As to Count 27, Mr. Clark was indicted for promoting a sexual performance by a minor as to M.C. "during the month of April, 2003," TR 1 4, yet he was convicted of promoting a sexual performance of a minor as to V.P. "over a period of time from January, 2003, through April, 2003." TR 2 125 The trial court never ordered that the indictment be amended, nor was there ever any mention by the Commonwealth of the need to amend the indictment.

As to Count 30, Mr. Clark was indicated for criminal attempt to commit promotion of a sexual performance of a minor as to V.P. "during the month of March, 2003." TR 1 5 He was convicted, however, of criminal attempt to commit promotion of a sexual performance of a minor as to K.C. "over a period of time from January, 2003, through April, 2003." TR 2 127-128 As to this count, there was some discussion on the record as to its factual basis, and the Commonwealth stated it was when K.C. was directed by Mr. Clark to engage in a sexual act with M.C., and K.C. declined. Tape 7 8/26/05 10:31:04 This court did not involve V.P. at all so apparently there is no relationship between the instructed count and the indicted count. As to Count 30, the Commonwealth stated it should be amended to K.C., Tape 7 8/26/05 10:30:52, but the court never so ordered.

The Appellee cites to Watkins v. Commonwealth, 565 S.W.2d 630, 631 (Ky. 1978), in support of its argument that RCr 6.16 was not violated in the instant case. In Watkins, the appellant was charged with first degree robbery and first degree assault after an attempted robbery at a liquor store. Present were two employees, Mr. Smith and Mr. Goeing. Proof was adduced that Mr. Smith was the individual who was told by appellant that "it was a hold-up." At the close of the Commonwealth's case, the prosecutor moved that the indictment be amended to charge the appellant with the robbery of Mr. Smith instead of Mr. Goeing. On appellate review, this Court held, "We see no prejudice in merely changing the names of the victims." Id.

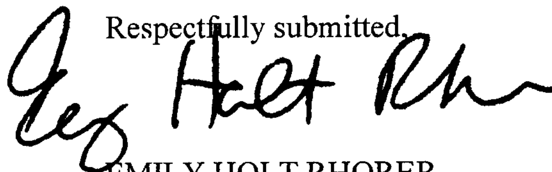
In the instant case, the amendment went beyond "merely changing the names of the victims." It involved charging two additional and different offenses—offenses the Grand Jury never considered as different children were involved as were different time

frames. Appellant submits that this case—involving 32 alleged counts of sexual activity with three children—is different from Watkins, which involved two counts, robbery and assault, and only two victims. In Watkins, the question for the jury was whether Mr. Watkins *was* the robber. Here, the jury had to consider numerous counts involving three different children, and might have opted to believe some allegations and not others. There is no way that Mr. Clark was "apprised of the charges so as to be able to adequately prepare a defense" to these two new offenses. Byrd v. U.S., 579 A.2d. 725 (D.C.1990) This is because the indictment was effectively amended to charge two different offenses, in violation of RCr 6.16. The convictions and sentences must be vacated.

CONCLUSION

For the foregoing reasons, and the reasons stated in his original brief, Mr. David A. Clark respectfully requests that this Court reverse his convictions and sentence and remand the case to the Hardin Circuit Court for a new trial, or to grant him any relief to which he may appear entitled.

Respectfully submitted,



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