

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Appellant,)	
)	Supreme Court No. 20120379
vs.)	District Court No. 09-2012-CR-01320
)	
Korsiba Arot,)	
)	
Appellee.)	

Appeal from Motion to Dismiss and Order dated September 24, 2012.
Cass County District Court
East Central Judicial District
The Honorable Wade L. Webb, Presiding

APPELLANT'S BRIEF

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N.D.C.C 29-28-07 ¶ 18

Other Authorities:

Federal Procedure, Lawyers Edition, 22:2445. ¶ 23

[¶ 3] STATEMENT OF THE ISSUE

[¶ 4] The State has shown by a Preponderance of the Evidence that the Appellee adopted [Birthday 1] as his official birthdate thus making him 18 on the dates of offense and his case was properly prosecuted in the district court.

[¶ 5] STATEMENT OF THE CASE

[¶ 6] The Appellee was charged in the underlying Information dated April 10, 2012, with three counts of A felony Gross Sexual Imposition, in violation of N.D.C.C. § 12.1-20-03(2)(a) and (3)(b). (Appendix “App.” at 1.)

[¶ 7] On or between May 1, 2011, and August 24, 2011, the Appellee had sexual contact with 13 year old H.R.S. (YOB 1997) and 14 year old M.O. (YOB 1996).

[¶ 8] The Appellee filed a Motion to Dismiss dated August 13, 2012, asking the court to dismiss for lack of proof of Defendant’s age as an adult on the dates of offense. (App. at 3.) The State responded on August 29, 2012. (App. at 12.)

[¶ 9] A hearing was held on September 12 and 13, 2012, in front of the Honorable Judge Wade Webb in which testimony and evidence were presented. (Hearing Transcript “HT” 1 of 2 and 2 of 2.)

[¶ 10] The district court entered an Order dated September 24, 2012, granting the Appellee’s Motion to Dismiss. (App. at 16.)

[¶ 11] **STATEMENT OF THE FACTS**

[¶ 12] The Appellee is an immigrant from South Sudan, Africa. (App. at 8.)

[¶ 13] No official records exist from his country of origin recording the Appellee's actual day, month and year of birth. Id.

[¶ 14] The Appellee was assigned a [Birthday 1] date of birth upon entry into the United States with his family in 2004. Id.

[¶ 15] Neither the Appellee's father or mother know his exact date of birth. Id.

[¶ 16] The Appellee has adopted [Birthday 1] as his official date of birth as evidenced by Cass County Juvenile Court records, Fargo Public School records, his North Dakota driver's license and a job application at Mexican Village.

[¶ 17] **STANDARD OF REVIEW**

[¶ 18] The State appeals the order quashing the information under the authority of N.D.C.C. § 29-28-07(1).

[¶ 19] “When the jurisdictional facts are not in dispute, the question of subject-matter jurisdiction is a question of law, and we review the jurisdiction decision de novo.” Gustafson v. Estate of Poitra, 2011 ND 150, ¶ 9, 800 N.W.2d 842 (citing Rolette Cnty. Soc. Serv. Bd. v. B.E., 2005 ND 101, ¶ 6, 697 N.W.2d 333).

[¶ 20] “Under this standard, we review the ‘questions of law subject to the de novo standard of review [and the] findings of fact subject to the clearly erroneous standard of review.’” Schirado v. Foote and J.L.F., 2010 ND 136, ¶ 7, 785 N.W.2d 235 (citing Wigginton v. Wigginton, 2005 ND 31, ¶ 13, 692 N.W.2d 108).

[¶ 21] JURISDICTION OF THE DISTRICT COURT

[¶ 22] The district court correctly found the Appellee's age was a jurisdictional matter and the State's burden of proof was a Preponderance of the Evidence. (HT 2 of 2, p. 49-51.) The district court found the legal reasoning of the Minnesota Supreme Court persuasive in its analysis of a similar issue in State v. Ali, 806 N.W.2d 45 (2011). (HT 2 of 2 at 46, ll. 20-25 and 47, ll. 1-3.)

[¶ 23] Several Federal Courts have passed on this issue and arrived at the same conclusion. See United States v. Salgado-Ocampo, 50 F.Supp.2d 908 (D. Minn. 1999); United States v. Hasan, 747 F.Supp.2d 642 (E.D.Virginia 2010); United States v. Dire, 680 F.3d 446 (4th Cir. 2012); Federal Procedure, Lawyers Edition § 22:2445.

[¶ 24] The Appellee argued for a burden of beyond a reasonable doubt. (HT 2 of 2 at 32.) The district court correctly found this to be a jurisdictional matter, not an element of the offense, and rejected this argument. (HT 2 of 2 at 49-51.) As Stated in Ali, "it is questionable in situations in which the defendant's country of origin does not maintain birth records whether, in a case in which the defendant's age is open to question, the State could ever meet a standard higher than preponderance of the evidence." Ali, at 54. "At the outset, the court notes that impossibility of definitively determining the defendant's date of birth." Salgado-Ocampo, at 909.

[¶ 25] **APPLICATION OF THE FACTS**

[¶ 26] The Appellee admits that proving his day, month and year of birth is not possible. (App. at 3.)

[¶ 27] The only showing the State can make is what date of birth the Appellee has adopted for official purposes. By a preponderance of the evidence, he has adopted [Birthday 1] as his date of birth.

[¶ 28] The State first offered evidence from Ms. Dawn Peters, a Cass County Juvenile Court Officer who most recently supervised Mr. Korsiba Arot on juvenile court probation. (HT 1 of 2 at 11 – 30.) At no time between December 17, 2007, and July 10, 2012, did the Appellee ever raise any concerns to the Cass County Juvenile Court that his date of birth was incorrect. (HT 1 of 2 at 24-25.) Ms. Peters produced a document called an “Information Sheet” which would have been filled out by the Appellee himself or one of his parents in 2007. (HT 1 of 2 at 20 and App. at 17.) It lists his date of birth as [Birthday 1]. Id. A photo copy of his Permanent Resident Card was also produced which shows his birthdate as [Birthday 1]. (HT 1 of 2 at 21-22 and App. at 19.) An Authorization to Disclose Information was filled out by the Appellee’s then juvenile probation officer Tim Bittner on January 19, 2011, listing the Appellee’s date of birth as [Birthday 1]. (HT 1 of 2 at 22-23 and App. at 20.) The Appellee signed and dated the bottom of this form. The Appellee also signed several other Authorization to Disclose Information forms for the Juvenile Court with his date of birth of [Birthday 1]. (HT 1 of 2 at 23-24 and App. at 21-23.)

[¶ 29] The State further offered evidence from Ms. Vanessa Boehm, the Davies High School counselor. (HT 1 of 2 at 31 – 67.) She was the Appellee’s counselor for his junior and senior years, ending upon his graduation in May of 2012. (HT 1 of 2 at 32 & 64.) Several school documents with the Appellee’s date of birth of [Birthday 1] were presented to the district court. In particular, on the ACT exam taken in December 2011, just a few months after the offense dates of May 1, 2011, to August 24, 2011, the Appellee filled out his date of birth as [Birthday 1]. (HT 1 of 2 at 39-41 and App. at 25.) In September 2011, Mr. Arot verbally verified with Ms. Boehm, that she could go ahead with his senior conference because he was 18 and his date of birth was [Birthday 1]. (HT 1 of 2 at 44-45.) The Appellee has never stated to Ms. Bohem or Davies High School officials that his date of birth was something other than [Birthday 1]. (HT 1 of 2 at 42, ll. 18-22.) The Appellee’s father, who also had conversations with Ms. Boehm, also did not object to the school’s use of [Birthday 1] as his date of birth. (HT 1 of 2 at 42.)

[¶ 30] The State finally called Mr. Christopher Novak, an assistant manager at Mexican Village where the Appellee applied for a job on April 17, 2011. (HT 2 of 2 at 6-20.) The Appellee, in Mr. Novak’s presence and in his own handwriting, wrote on the I-9 form that his date of birth was [Birthday 1]. (HT 2 of 2 at 12-13 and App. at 26.) The Appellee’s signature appears on this form directly below the portion which reads “I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the

completion of this form.” (App. at 26.) The Appellee also presented his North Dakota driver’s license and permanent resident card to Mr. Novak with the date of birth of [Birthday 1]. (HT 2 of 2 at 13 and App. at 27.)

[¶ 31] The final item of evidence presented to the district court was a certified copy of the Appellee’s driver’s license with his date of birth of [Birthday 1]. (HT 2 of 2 at 19-20 and App. at 28.)

[¶ 32] ANALYSIS

[¶ 33] The district court stated “[m]y sympathies, frankly, are with the State of North Dakota on this.” (HT 2 of 2 at 46, ll. 19-20.) “I think the State’s put in a difficult position based upon what I believe the law is”. (HT 2 of 2 at 47, ll. 4-5.) “The State of North Dakota, like the state prosecutors in the other states, are in such a position as how are they possibly going to really rebut that, if not meet their burden.” (HT 2 of 2 at 48, ll. 13-16.) “The best way the State can try is to provide other documentation of affirmations of the Defendant of, hey, that’s really my birth date, etcetera, which the State tried to do here.” (HT 2 of 2 at 49, ll. 11-14.)

[¶ 34] “[The State has], done [its] job.” (HT 2 of 2 at 51, l. 1.) “[The State has] provided the Court with many different documentation, including Exhibit No. 4, for example, the driver’s license division where the State of North Dakota says, hey, date of birth for the Defendant is [Birthday 1].” (HT 2 of 2 at 51, ll. 1-5.)

[¶ 35] “You have to prove his age at the time of the commission of the offense.” (HT 2 of 2 at 52, ll. 10-11.) “Good luck finding those admissions.” (HT 2 of 2 at 53, l. 1.) “The admissions that were received in this courtroom, as characterized by this Court as admissions, included admissions to Ms. Boehm in September of 2011 and the admission to Ms. Boehm in May of 2012 that the Defendant indicated to her orally that he was 18 years of age. Great. I believe it. That’s after the offense dates alleged in the Information of May 1, 2011, and August 24, 2011.” (HT 2 of 2 at 52, ll. 12-18.)

[¶ 36] Requiring proof that the Appellee’s admissions were prior to the dates

of offense conflicts with the district court's explicit findings that this was a jurisdictional matter and not an element of the offense. In North Dakota, the jurisdiction of the district court over the juvenile court is determined by the defendant's age when charges are filed. N.D.C.C. § 27-20-34 (8) and State v. Woodrow, 2011 ND 192, 803 N.W.2d 572; also see State v. LeQue, 442 N.W.2d 494 (Wis. 1989). When the juvenile court lacks subject matter jurisdiction, orders of the juvenile court must be set aside. N.D.C.C. § 27-20-37(1)(b). Under N.D.C.C. 27-20-34(8), if a minor commits an offense where the State of North Dakota cannot prosecute until the defendant is 20 years of age, the matter is prosecuted in district court. Limiting proof of age to only that which existed before the dates of offense would create unnecessary difficulties for the courts and the State. When the matter is jurisdictional, consideration of the Appellee's admissions should not have been restricted to those made prior to the dates of offense.

[¶ 37] In any event, the State did present evidence of the Appellee's admissions prior to the dates of offense. "Mr. Novak testified here that the Defendant did write, not state, but write, the date of birth of [Birthday 1] in front of him on a work form. Little different animal. He's applying for a job. He has to provide the I-9 form for the job. It's not really a governmental proceeding or a quasi governmental proceeding. It's not a school situation. It's not a benefit situation....He's simply applying for a job and he put down the date that is on his I-9 form which, again, in my world anyway, that would be his date of birth, whether it's

true or not, it is what it is. That's not the law." (HT 2 of 2 at 53, ll. 8-20.)

[¶ 38] Mr. Novak's testimony was that the Appellee wrote on an I-9 form during a job application on April 17, 2011, that his date of birth was [Birthday 1]. This indeed satisfies the district court's desire for proof of the Appellee's confirmation of his [Birthday 1] date of birth prior to the dates of offense. But the district court stated that it was not made to a government official nor during a government proceeding. However, it was written on a government I-9 form in front of the witness. And again, this signature appears directly below the language on the form which reads "I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form." (App. at 26.)

[¶ 39] "The State of North Dakota is free, of course, to proceed in juvenile court as it deems appropriate or not." (HT 2 of 2 at 56, ll. 3-4.) The district court, however, did not and could not make findings that the Appellee's date of birth was something other than [Birthday 1]. According to all records in the Cass County Juvenile Court and all government documents, the Appellee was 18 on the dates of offense. The State cannot prove to the juvenile court to any standard that the Appellee was a juvenile on the dates of offense. The only such evidence is the very flawed affidavit of the Appellee's father. (App. at 8.) His father has no knowledge of any specific date but rather said it was the "dry season". As the State argued to the district court, according to the Appellee's own documents on the weather in Juba, Sudan, the town of the Appellee's birth, the dry season was January

through March. (App. at 10.) As such, the [Birthday 1] birth date may be more accurate than [Birthday 2] which the Appellee has proposed. Curiously, [Birthday 2], the Appellee's proposed birth month, was the month after the date of offense in the underlying criminal case. Finally, since his father did not speak English, it was conceded that the Appellee actually translated the affidavit for his father. (HT 1 of 2 at 7, ll. 8-12.) Furthermore, "sometime in [Birthday 2]" does not establish a date of birth recordable by the juvenile court or other government agencies. Thus, the State could not meet any burden to prove an alternate date of birth. The State is then left in a quandary as to where and how the case can be prosecuted. As such, the district court's decision was clearly erroneous.

[¶ 40] CONCLUSION

[¶ 41] WHEREFORE, the State requests the decision of the district court be overturned and the Information against the Appellee be reinstated in district court.

Dated this 22nd day of January, 2013.

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[¶ 42] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on the 4th day of February, 2013, to: Mr. Benjamin Pulkrabek, pulkrabek@lawyer.com

Ryan J. Younggren

[¶ 40] CONCLUSION

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