

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20120379

State of North Dakota,

Appellant

- vs -

Korsiba Arot,

Appellee

APPEAL FROM MOTION TO DISMISS
AND ORDER DATED SEPTEMBER 24, 2012
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CR. NO. 09-2012-CR-1320
THE HONORABLE WADE L. WEBB, PRESIDING

BRIEF

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701/663-1929

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ABBREVIATIONS

Appendix - App.

Transcript - Tr.

Volume - Vol.

Page - P.

Line - L.

STATEMENT OF THE ISSUES

[¶1] ISSUE:

I. Did the State fail to prove by a preponderance of the evidence that Appellee's official birth was [Birthday 1]?

STATEMENT OF THE CASE

¶2] 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.)

¶3] 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.)

¶4] 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. (Tr. Vol. 1 & 2)

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

STATEMENT OF FACTS

¶6] Appellee’s county of origin is South Sudan in western Africa. Appellee, his father, mother and three siblings are refugees that had fled from South Sudan. They were all allowed to immigrate to the United States in 2004. When they fled South Sudan they had to leave many records including their birth records behind. When the Appellee, his father, mother and three siblings came to the United States they were each assigned an arbitrary birth date, January 1 in their respective birth years. App. P. 8.

¶7] Appellee’s father, Ali Ayaria Arot in his affidavit states that he knows Appellee’s birth date is not [birthday 1]. The reason Mr. Arot knows Appellee’s birth date is [birthday 1] is he was present in Juba South Sudan at Appellee’s birth when it occurred in the late summer of 1993. Mr. Arot knows it was the late summer because it was the dry season. App. P. 8-9.

[¶8] In South Sudan the dry northeasterlies begin in September. App. p. 10.

[¶9] On April 10, 2012 Appellee was charged in the District Court of Cass County North Dakota with three counts of gross sexual imposition (three crimes) App. p.1. Appellee made a motion to have these three crimes dismissed because he wasn't 18 years of age on the dates when any of the three crimes were committed. Therefore because he wasn't 18, the district court lacked jurisdiction over him. App. P. 3. The State responded to Appellee's Motion and said Appellee's birth date was [birthday 1] and therefore he was 18 on the dates the three crimes were committed. App. P. 12-14.

[¶10] Hearings were held on September 12th and 13th of 2012 on Appellee's Motion to Dismiss. During these hearings both sides were allowed to give testimony, put in evidence and give oral arguments. At the conclusion of these hearings the trial court granted Appellee Motion to Dismiss. When the trial court granted the motion the court said the Motion to Dismiss was granted because the State had failed to meet its burden of proving by a preponderance of the evidence that Appellee was 18 years of age on the dates the three crimes were committed. Tr. Vol 1 & 2.

[¶11] The trial court signed the Order to Dismiss on September 24, 2012. App. P. 16.

[¶12] The State appealed the dismissal on October 12, 2012. App. P. 32. This matter is now before the North Dakota Supreme Court.

ISSUE

[¶13] Did the State fail to prove by a preponderance of the evidence that Appellee's official birth was [Birthday 1]?

ARGUMENT

[¶14] Appellee disagrees with the Appellant’s Standard of Review. He disagrees because for Appellant’s Standard of Review to be correct there can’t be any jurisdictional facts in dispute.

[¶15] In this case the Appellant believes the jurisdictional fact in dispute is the age of the Appellee on the dates of the three crimes. This jurisdictional fact was ruled on by the trial court as follows: “The State has failed to meet its burden by a preponderance of the evidence that the defendant was 18 years of age at the time of the alleged offenses in counts one, two and three in file 09-2012-CR-1320, Tr. Vol. 2, P.54, L.16-19. The trial court then said:. . . “so ordered by the court that the Motion to Dismiss is granted. The charges against the defendant in file 09-2012-CR-130 are dismissed. Tr. Vol. 2, P. 55, L.23-25.”

[¶16] Paragraph 19 of Appellant’s Standard of Review states:

[¶19] (“When the jurisdictional facts are not in dispute, (emphasis added) the question of subject-matter jurisdiction is a question of law, and we review the jurisdiction decision de novo.” Gusatafason 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).

[¶17] Appellee disagrees with Appellant’s [19] because he believes that his age at the time the three crimes were committed is a jurisdictional fact.

[¶18] Paragraph 20 of the Appellant’s Standard of Review states:

[¶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, 784 N.W.2d 235 (citing Wigginton v. Wigginton, 2005 ND 31, ¶13, 692 N.W.2d 108).

[¶19] Appellee believes that the trial courts ruling that the Appellant didn't meet its preponderance of the evidence proof on Appellee's age on the dates of the three crimes is a finding of fact that is subject to the clearly erroneous standard of review. Once that standard of review is completed the trial courts ruling on Appellee's Motion is either affirmed or reversed. Which ever way the Supreme court rules will decide whether the District Court or the Juvenile Court has jurisdiction leaving nothing to be reviewed on a de novo standard.

[20] Before the trial court could make any ruling on the age of the Appellee, it had to decide what was the burden of proof the State had to meet in proving Appellees age on the dates of the three alleged crimes. In reaching its decision the court looked at two cases. The first was State vs Mohamed 178 Ohio. app. 3d 695, 2008 Ohio 5591 where the proof of age is beyond a reasonable doubt. The second case was a Minnesota case, State vs Ali 806 NW2d 45 (2001). That case decided that the defendant's Ali's age was not an element of any of the criminal charges. Therefore the burden of proof on age would be a preponderance of the evidence and not beyond a reasonable doubt.

[¶21] The burden of proof the trial court in this case decided to use was the preponderance of the evidence in Ali as the burden of proof that the State must meet to prove the age of Appellee.

[¶22]. The following is a summary of the evidence and testimony at the hearing from which the trial court decided whether or not the State has met its preponderance of the evidence burden of proof as to Appellee's age:

Evidence and testimony presented by Appellee:

1. Appellee's fathers affidavit that shows where Appellee was born, that Appellee's father was present at Appellee's birth and the time of year when Appellee was born. App. P. 8 & 9.
2. Exhibit 2 which establishes the time of year Appellee was born.

Evidence and testimony presented by Appellant:

1. [Birthday 1 was an assigned birth date given to Appellee. Tr. 1 Vol. 1, P. 51, L.14 to P. 53., L.9.
2. Witness that had dealing with Appellee that involved Appellee's age being [Birthday 1].
3. Documents showing Appellee's birthday was [Birthday 1].

[¶23] Several times during the hearing the trial court reminded the parties the burden of proof of Appellee's age was on the State and that burden was a preponderance of the evidence.

[¶24] In spite of that warning the State allowed Appellee's fathers affidavit to go into evidence without cross examining Appellee's father. Tr. Vol 1, P. 5. L.25 to P.6, L.1-7 and P.10, L.1-16.

[¶25] The State's allowing the Appellee's fathers affidavit to go in without cross examining Appellee's father allows the court to consider that affidavit on its face without flaws and allows the court to give that affidavit whatever weight the trial court deems appropriate.

[¶26] How the trial court considered all of the evidence and testimony and why the trial court ruled in favor of Appellee's Motion to Dismiss is set out in Tr. Vol. 2, P.45, L.11 to P. 56, L.17.

[¶27] The trial courts problem in finding the true birthday of Appellee was:

1. The State's proof could only establish a birth date [birthday 1] for Appellee that was arbitrarily assigned to Appellee.

2. The affidavit of Appellee's father which establishes Appellee's birth date couldn't be [birthday 1] but did establish Appellee's birth date was at a different time of the year.

3. That Appellee's fathers affidavit established a different time of year and month for Appellee's birth but didn't establish a day.

4. That the burden of proof required to prove Appellee's birth date and age was by a preponderance of the evidence and looking at the proof submitted by both sides neither side proved Appellee's birthday by a preponderance of the evidence.

[¶28] Because of the testimony and evidence didn't prove Appellee's birth date by a preponderance of the evidence, the trial court had no choice but grant Appellee's Motion to Dismiss.

[¶29] The State claims it has an additional problem with the trial courts decision because [Birthday 2] isn't a recordable birth date. Therefore, if the assigned birth date isn't Appellee's birth date the State can't prove any alternate birth date. If this is true, this is a legislature problem because the legislature has only set out a procedure in Chapter 32-37 NDCC for establishing dates of birth. This procedure can only be brought by certain persons and the State isn't considered one of these persons.

[¶30] The legislature is currently in session. So if the State has a problem with the current State of North Dakota law regarding establishing birth dates, it should be asking the legislature for a law that would allow them to establish birth dates.

[¶31] For the above and foregoing reasons the Order the District Court dismissing the Appellee's three criminal charges should be affirmed.

CONCLUSION

[¶32] Because and for the above and foregoing, the trial courts Order granting Appellee's Motion to Dismiss should be affirmed.

DATED this 18th day of February, 2013.

/s/ Benjamin C. Pulkrabek
Benjamin C. Pulkrabek, ID #02908

CERTIFICATE OF SERVICE BY MAIL

[¶33] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on February 18, 2013, she served, by e-mail and mail a copy of the following:

APPELLEE'S BRIEF

to:

Ryan J. Younggren
Cass County State's Attorney's Office
Younggrenr@casscountynd.gov

Mailed to:

Korsiba Arot
3101 - 32nd St. S. #18
Fargo, ND 58103

The undersigned further certifies that on February 18, 2013, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLEE'S BRIEF.

_ /s/ Sharon Renfrow _____
Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek