

Children's Law Center of Indiana



Delinquency

01/24/2007

In **C.D.H. v. State**, 860 N.E.2d 608 (Ind. Ct. App. 2007), the Court reversed the juvenile court's adjudication of the juvenile as delinquent for committing an act that would be child molesting a Class C felony if committed by an adult. The juvenile, a ten-year-old boy, lived next door to a ten-year-old girl. Both children attended a summer program for children with behavioral problems at a children's hospital together. The girl had been diagnosed with Broca Aphasia (a problem with the brain that affects speech), as being mildly mentally retarded, as being bi-polar, and as having impulse problems. The record did not indicate the reasons the juvenile attended the program. On the day in question, the boy was visiting the girl's house. The girl's stepfather found the boy on top of the girl, in the girl's bed, with the boy's trouser's down. A rape kit examination was performed on the girl, but it did not recover any physical evidence of sexual assault. The State charged the boy with attempted rape and later amended the charges to include child molesting. The girl testified that the juvenile had entered her room, gotten into bed with her, and touched her "private part" with his. The juvenile court made a true finding of child molesting, but found the evidence insufficient to support a true finding of attempted rape. After a dispositional hearing, the juvenile court ordered the juvenile to probation and placed him in a private child caring facility. The juvenile appealed alleging that the evidence was insufficient to find beyond a reasonable doubt that the juvenile had the requisite intent because both the juvenile and the girl were ten years old when the act took place.

The Indiana child molestation statute, I.C. 35-42-4-3(b), requires the State to prove beyond a reasonable doubt that the offender is older than the victim. *Id.* at 615. The Court found that this case required it to interpret Indiana's child molestation statute. The Court noted that the standard of review for interpreting a criminal statute includes: (1) penal statutes should be construed strictly against the State and ambiguities should be resolved in favor of the accused; (2) statutes should not be narrowed so much as to exclude cases they would fairly cover; (3) it is assumed that the language in a statute was used intentionally and that every word should be given effect and meaning; (4) the statute should be given a practical application by construing it in a way favoring public convenience and avoiding absurdity, hardship, and injustice; and (5) statutes concerning the same subject matter must be read together to harmonize and give effect to each. *Id.* at 610-11. Indiana's child molestation statute, I.C. 35-42-4-3(b) states:

A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony.

According to the Court, the ordinary, plain language of the statute requires that the act of child molesting involve two people: (1) a child under the age of fourteen; and (2) a person older than that child. The Court found that the legislature intentionally used the word "older;" and that its

interpretation puts the child molestation statute in harmony with the Indiana statutes proscribing vicarious sexual gratification, sexual conduct in the presence of a minor, child solicitation, child seduction, and sexual misconduct with a minor. The Court discussed its opinion in State v. J.D., 701 N.E.2d 908 (Ind. Ct. App. 1998), *trans denied*, and stated: “To the extent that J.D. implies that the perpetrator need not be older than the victim, we find this implication to be an incorrect statement of the law. However, we restate our holding in J.D. that a charge of child molesting can be appropriate where the offender is below the age of fourteen. [Id.] at 910.” Id. at 611-12.

The Court disagreed with the State’s identification of the purpose of I.C. 35-42-4-3(b) as “to prevent and punish those who force others to submit to sexual behavior without consent.” The Court stated that consent is neither an element to be proved in a child molestation case nor a defense to such a charge, and gave the purpose of the statute as “to prohibit the sexual exploitation of children by those with superior knowledge or experience who are therefore in a position to take advantage of children’s naivety.” To the State’s assertion that the Court’s interpretation of the statute “allows minors to molest another child as long as the molester is younger than the victim,” the Court stated that (1) the Indiana sexual battery statute, I.C. 35-42-4-8(a), proscribes sexual touching accomplished by “force or the imminent threat of force,” or when the other person is “so mentally disabled or deficient that consent to the touching cannot be given;” and (2) the Indiana rape and criminal deviate conduct statutes, I.C. 35-42-4-1 and I.C. 35-42-4-2, respectively, proscribe conduct when one person “(1) is compelled by force or imminent threat of force; (2) the other person is unaware that the conduct is occurring; or (3) the other person is so mentally disabled or deficient that consent to the conduct cannot be given.” The Court also noted that none of these three statutes contains any mention of the age of the victim or offender, and delinquency proceedings may properly be brought against a child based on violations of any of them when the other child is the same age as or older than the offender. C.D.H. at 612-13. The Court further stated:

The legislature does not define “older” in the statute, and we do not decide here whether “older means (1) older by some period of time such as one day, one month, or one year, i.e., two children are ten years old, but one who was born a day earlier is “older”; or (2) of a different age, i.e., as long as two children are both ten years old, the child who was born first is not “older” until that child’s eleventh birthday.

Id. at 613 n.10.

In this case, insufficient evidence existed from which a reasonable fact finder could conclude that the juvenile was older than the girl. Id. at 615. The Court concluded that the statements of the girl, whose testimony was far from consistent in regards to matters relating to time, and the statements of the girl’s stepfather, who “believed” the juvenile to be eleven, provided insufficient evidence that the juvenile was older than the girl. The Court held that, based on the evidence introduced at the trial, a reasonable factfinder could not have concluded beyond a reasonable doubt that the juvenile was older than the girl. Id. at 614.

Barnes, J., dissented with a separate opinion in which he stated that he agreed with the majority’s interpretation of I.C. 35-42-4-3(b), but he considered the evidence sufficient to prove that the juvenile was older than the girl. Id. at 615-17.