



Delinquency

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In **D.B. v. State**, 842 N.E.2d 399 (Ind. Ct. App. 2006), the Court affirmed in part, reversed in part, and remanded with instructions to vacate the juvenile court's true finding of child molesting. In March 2004, while the twelve-year old female victim was spending the night at her grandmother's house trailer, sleeping on the couch, she awoke to find the juvenile, who is mother's fifteen-year-old half-brother, on top of her. The juvenile kissed her, and the victim told him "no" and tried to "nudge" him off her by pushing with her arm. The juvenile pulled down the victim's underwear, inserted his penis into her vagina, and had sexual intercourse with her. The juvenile then returned to his room while the victim cried herself to sleep. The victim did not tell anyone of the incident until she found herself five months pregnant. At first she told her mother someone else was the father, but eventually told her mother that the juvenile had raped her. In December 2004, the juvenile was taken into custody and detained after a hearing. He was charged with rape and child molesting, both Class B felonies when committed by an adult. In March 2005, the juvenile court entered a true finding on both counts. In April 2005, after a dispositional hearing, the juvenile court ordered that the juvenile be placed in the Department of Correction (DOC) until his eighteenth birthday, undergo individual counseling, participate in a sexual offender program, and continue his education. The juvenile appealed alleging that (1) the evidence was insufficient to support true findings of rape and child molesting; (2) his adjudications of rape and child molesting subjected him to double jeopardy; (3) the juvenile court abused its discretion by committing the juvenile to the DOC instead of a less restrictive alternative; and (4) the juvenile court abused its discretion in not crediting the juvenile for time he spent in detention prior to his adjudication and dispositional hearing.

The evidence was sufficient to support true findings of child molesting and rape. Id. at 402-03. The Court found sufficient evidence to support beyond a reasonable doubt every element of the child molesting finding, in the victim's testimony: (1) to facts that established that she was under fourteen at the time of the incident; (2) she was asleep on the couch but woke up when the juvenile "came on top of me;" (3) he "had his leg over me, like almost sitting on me but not really;" (4) she recognized the juvenile who was her uncle; and (5) the juvenile kissed her, removed her underwear, stuck his penis into her vagina, and "was pushing." Regarding the juvenile's argument that there was no evidence of force or imminent threat of force to support the rape finding, the Court quoted Tobias v. State, 666 N.E.2d 68, 72 (Ind. 1996):

[I]t is the victim's perspective, not the assailant's, from which the presence or absence of forceful compulsion is to be determined. This is a subjective test that

looks to the victim's perception of the circumstances surrounding the incident in question. The issue is thus whether the victim perceived the aggressor's force or imminent threat of force as compelling her compliance.

The Court found that a factfinder could have concluded the victim perceived that the juvenile was compelling her compliance by force or an imminent threat of force. In this regard, the Court cited the victim's testimony that: (1) she was asleep on the couch and woke up when the juvenile sat on her; (2) after the juvenile kissed her, she said no and tried to "nudge" him off her; (3) she was not able to move or stop him because "the couch was [sic] really that big," and the juvenile was "much bigger" than she and his weight on top of her was part of what prevented her; and (4) she didn't say anything or call out to her grandmother because she was afraid that the juvenile would "hit me or something [sic] bad happen." Id.

The Court found that the convictions for rape and child molesting contravened the double jeopardy protections in the Indiana Constitution and vacated the juvenile's true finding of child molesting. Id. at 404. The Court declined the State's apparent invitation to hold that a juvenile adjudication can never implicate double jeopardy based on the State's argument that, because there is only a single disposition based on all true findings in a juvenile adjudication, as opposed to separate sentences for separate convictions in the adult criminal system, the juvenile was not subjected to multiple punishments and "double jeopardy concerns ... are simply not implicated." Instead, the Court relied on and quoted from Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999):

[T]wo or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

The Court explained that, regarding the statutory elements test, each offense must include a least one essential element the other offense does not, and that, under that test, rape and child molesting are separate offenses in that rape requires proof of force while child molesting requires proof of age. According to the Court, the second consideration in the double jeopardy analysis is the actual evidence test and "under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts." Id. at 53. To succeed under the actual evidence test, here, the juvenile must demonstrate "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Id. The Court held that because the gravamen of both offenses is nonconsensual sexual intercourse, a conviction and sentence for rape and child molesting based on a single act has been held to violate principles of double jeopardy, and, here, inasmuch as the victim testified to only one instance of nonconsensual sexual intercourse with the juvenile, there is a "reasonable possibility" the juvenile court used this fact to establish the essential elements of both rape and child molesting. D.B. at 403-04.

The juvenile court did not abuse its discretion in ordering the juvenile placed in the DOC, where it based its disposition on the juvenile's prior juvenile history and the

apparently limited success of prior dispositional alternatives; it noted the juvenile had “moved from [being] a victim to [a] predator;” and it included individual counseling, sexual offender counseling, sexual offender treatment and continuation of his education as part of his commitment to DOC. *Id.* at 406. The Court discussed the policy and purpose of the juvenile code as set forth in I.C. 31-10-2-1 and the factors the juvenile court must consider in making a juvenile disposition set forth in I.C. 31-37-18-6. I.C. 31-37-18-6 requires the juvenile court to select the least restrictive placement in most situations, but “the statute contains language which reveals that under certain circumstances a more restrictive placement might be appropriate,” and “the statute recognizes that in certain situations the best interest of the child is better served by a more restrictive placement.” *K.A. v. State*, 775 N.E.2d 382, 386-87 (Ind. Ct. App. 2002) *trans. denied*. The Court noted that, here: (1) the Dispositional Order indicates the juvenile had prior true findings of criminal mischief when he was ten, theft when he was thirteen, and battery when he was eleven and fifteen, as well as other allegations; (2) the juvenile court had previously ordered alternative dispositions for the juvenile, including docket fees, probation, probation fees, probation administrative fees, placement in home, faith-based counseling, home-based counseling, community service work, and a suspended commitment to DOC; (3) the Pre-Dispositional Report indicates that the juvenile’s older brother began molesting him when the juvenile was six; and (4) the report notes the juvenile had fondled two female peers when he was six or seven, had begun touching the victim sexually when he was eight and she was four, used marijuana on a daily basis, and had attendance problems at school. *D.B.* at 405-06.

The Court held that it need not decide whether the juvenile code authorizes credit for pre-disposition detention because the juvenile court placed the juvenile in DOC until his eighteenth birthday, and, therefore, regardless of any pre-disposition detention credit to which the juvenile might otherwise be entitled, the juvenile will remain in the DOC until his eighteenth birthday. *Id.* at 406.