

NOTED DOCKET
 DATE: JUL 26 2013
 DAVID "BUGS" STOVER
 CLERK CIRCUIT COURT
 WYOMING COUNTY

13-0910

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

**Robert Junior Thomas,
 Petitioner,**

v.

**Criminal Case No: 08-F-54
 Case No. 11-C-180
 Post-Conviction Habeas Corpus**

**DAVID BALLARD, Warden
 Mount Olive Correctional Complex,
 Respondent**

ORDER

**Granting petition for post-conviction habeas corpus;
 Setting aside verdict;
 Granting new trial.**

PROCEDURAL HISTORY

1. On October 6, 2008, the grand jury of Wyoming County indicted the petitioner for the offense of "Sexual Abuse by Parent, Guardian Or Custodian" in violation of *West Virginia Code* § 61-8D-5. A copy of the indictment is attached as Exhibit A.
2. On November 4, 2009, defendant was convicted by jury trial.
3. On September 22, 2010, the Supreme Court of Appeals refused the petitioner's direct appeal of that conviction.
4. On December 1, 2011, petitioner filed his original petition for post-conviction habeas corpus relief. The original time frame order was entered on or about December 7, 2011 and subsequently amended from time to time.
5. On April 23, 2012, petitioner filed the present amended petition for post-conviction habeas corpus. By order of April 30, 2012, this court summarily dismissed the petition in part, granted the petition in part, and directed the

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prosecuting attorney of Wyoming County to file a response to the issues that were not summarily dismissed.

6. The omnibus hearing on the petition was conducted September 28, 2012, and the matter was then submitted for ruling.

FACTUAL SUMMARY

Upon review of the evidence presented at the trial of this matter, the following factual basis will be assumed for the purposes of this ruling:

1. The petitioner was a bus driver for the Wyoming County Board of Education.
2. The petitioner engaged in consensual sexual intercourse with a person who was over the age of sixteen years and under the age of eighteen years.
3. The person with whom petitioner engaged in sexual intercourse was a public school student who was a regular passenger on the bus regularly operated by the petitioner.
4. The petitioner's acquaintance with the child developed at a time when he was operating the school bus on which the child was a passenger.
5. On the date of the offense charged, the petitioner acting in his in his capacity as school bus driver delivered the person to her home at the ordinary time following the end of the school day.
6. The petitioner and victim had consensual sexual intercourse at approximately 11:30 p.m. during the nighttime following a school day.

In the general sexual offense statutes, a person is deemed incapable of consent if he or she is less than sixteen years of age. *W. Va. Code* § 61-8B-2(c). An act of consensual sexual intercourse with a person over the age of sixteen is therefore not prohibited by those statutes.

The state elected to prosecute the petitioner under *W. Va. Code* § 61-8D-5(a), which is not among the general sexual offense statutes but is, rather, among the statutes that identify prohibited acts of child abuse. Under that statute, it is deemed to be an act of criminal child abuse if a person engages in consensual sexual intercourse with a child if

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certain circumstances are present. A "child" is defined in that statute as any unemancipated person under the age of eighteen years. *W. Va. Code* § 61-8D-1(3).¹

As a result, the sexual intercourse between petitioner and the alleged victim, who was older than sixteen but younger than eighteen years, would not support conviction unless one or more of the special circumstances identified in *W. Va. Code* § 61-8D-5(a) are proven.

Petitioner's primary claim is ineffective assistance of counsel. The test for this claim is stated in *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995):

In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Miller*, syll. pt. 5

In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. *Miller*, syll. pt. 6

Petitioner's primary ineffective assistance claim is that his trial counsel did not offer an instruction that assisted the jury to determine whether any of the special circumstances identified in *W. Va. Code* § 61-8D-5(a)² was proven. As applied to the

¹ "Child" means any person under eighteen years of age not otherwise emancipated by law. *W. Va. Code* § 61-8D-1(3)

² *W. Va. Code* § 61-8D-5(a): If any parent, guardian or custodian of or other person in a position of trust in relation to a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct, or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, then such parent, guardian, custodian or person in a position of trust shall be guilty of a felony and, upon conviction thereof, shall be imprisoned in a correctional facility not less than

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facts of this case, the special circumstances necessary to the elements of the charge are summarized as the following:

1. That the accused be a
 - a. Parent,
 - b. Guardian,
 - c. Custodian, or
 - d. A person in a position of trust in relation to a child under his or her care, custody or control
2. Who engaged in sexual intercourse, sexual intrusion or sexual contact with sexual intercourse
3. With a child under his care, custody or control.

The terms "parent"³, "guardian"⁴, and "custodian"⁵ are defined in the statute. The state concedes that the petitioner was not within any of those three categories. It was the prosecution's theory that the petitioner qualified as a "person in a position of trust as to a child in his care, custody or control" in relation to the victim because he was the school bus driver for the bus upon which the victim regularly traveled from public school to her home.

The terms "position of trust," "care," or "control" are not defined in the statute. The meaning of the term "custody," while not specifically defined in the statute, may be inferred from the definition of the term "custodian" on the assumption that the

ten nor more than twenty years, or fined not less than \$500 nor more than \$5,000 and imprisoned in a correctional facility not less than ten years nor more than twenty years.

³ "Parent" means the biological father or mother of a child, or the adoptive mother or father of a child. *W. Va. Code § 61-8D-1 (7)*

⁴ "Guardian" means a person who has care and custody of a child as the result of any contract, agreement or legal proceeding. *W. Va. Code § 61-8D-1 (5)*

⁵ "Custodian" means a person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding. "Custodian" shall also include, but not be limited to, the spouse of a parent, guardian or custodian, or a person cohabiting with a parent, guardian or custodian in the relationship of husband and wife, where such spouse or other person shares actual physical possession or care and custody of a child with the parent, guardian or custodian. *W. Va. Code § 61-8D-1 (4)*

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relationship that emerges from qualification as a "custodian" should be deemed "custody" of the person the "custodian" is custodian of.

On the facts of this case, the prosecution is required to address two distinct issues: (1) whether an accused is in a "position of trust" as to the alleged victim, and (2) whether the alleged victim was in the accused's "care, custody, or control" at the time of the acts alleged. If the Legislature had intended that the elements of the crime require only that the accused be in a position of trust as to the victim, the statute would not have included the additional element that the victim must be in his care, custody, or control.

The statute's separation of the factors of "position of trust" and "in his care, custody and control" indicates that the existence of a relationship which constitutes a "position of trust" does not require the conclusion that the child is thereby deemed to be always in that person's "care, custody or control." As a result, the question whether a specific child is or is not in the accused's care, custody, or control at any specific time is an issue of fact for the jury.

These issues can merge and separate. In the present case they merge while the child is on the school bus and for some period before or afterward, measured by a reasonable extension of the custodial duties arising from his position as the child's bus driver, but the language of the statute clearly supports the conclusion that the issues may separate afterward.

The evidence in this case starkly separates these two issues: (1) the petitioner might have been in a position of trust because he is the child's bus driver, but (2) it must be separately determined whether at the time of the act of sexual intercourse the child was in his care, custody, or control. The legislative intent to separate these two issues is clear from the text of the statute. It is not sufficient the accused be in a position of trust. It is also necessary that the person as to whom he is in a position of trust be in his care custody or control at the time of the acts charged.

If the sexual act had occurred on the bus, or near in time before or after the time the alleged victim was on the bus, perhaps measured by a reasonable period of time after she left the bus but before she was restored to the protection of her parents, there is little doubt that these two issues would satisfactorily merge. But those are not the facts of this case.

Under these circumstances, the petitioner could not have been convicted of the crime unless the prosecution proved to the jury beyond a reasonable doubt that the petitioner's relationship with the victim was that of a person in a position of trust as to the alleged victim and who at the time of the act alleged was in his care, custody, or control. The state's theory was that it is sufficient that the petitioner was the school bus driver for the

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bus on which the victim, a public school student, was transported from school to home to place the petitioner in that relationship with the child.

The state and petitioner agree that the question whether the petitioner was in a position of trust as to the victim is a jury issue, and this court agrees. The state argues that the evidence supports the conclusion that the petitioner exploited his position as a bus driver to entice the victim, in particular, by promising to help her with her grades or her homework. The evidence was not clear, however, as to whether the victim's conduct with the petitioner was directly associated with that enticement. It is even less clear that even if that were what motivated the child to place herself in the petitioner's company, such constitutes care, custody, or control by the petitioner.

The question of care, custody or control is further complicated by evidence that on the day in question the victim had gone home from school and later left her home without the knowledge of her parents, and had been in the company of other persons during the evening before she eventually entered the presence of the petitioner, entered his vehicle, and had sexual intercourse with him. Petitioner argues that the question the jury had to decide was whether at the time of the sexual act the petitioner's relationship with the victim was that of a person in a position of trust as to a person who was in his care, custody, or control.

Petitioner's argument is supported by *State v. Longerbeam*, 226 W.Va. 535, 703 S.E.2d 307 (2010). On a much different factual pattern, the *Longerbeam* opinion concluded that this category of relationship requires that that the alleged victim be under the supervision, "or to be statutorily-specific [the] 'care, custody or control,' of the Appellant *when she was subject to the alleged abuse.* (emphasis added)"

In the present matter, the origin of the "care, custody, or control" element presented by the state was that defendant was the alleged victim's school bus driver. The state did not assert that the alleged victim was in the "care, custody, or control" of the petitioner by virtue of some other relationship, or by whatever else might have brought them into each other's company at the time of the sexual act. If it was the state's theory that the factor that brought them together at the time of the act alleged was that the defendant was her bus driver, and that this relationship is what placed her in the "care, custody, or control" of the petitioner at that time, then the state has the burden to convince the jury of that fact.

If it was the petitioner's counsel's trial theory that the sexual encounter between petitioner and the alleged victim arose from circumstances that were completely independent of his role as her bus driver, and that she was not *at that time* in whatever degree of "care, custody, or control" that arises from his having been her bus driver

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earlier in the day, it was necessary to offer for the court's consideration an instruction to assist the jury with the point of law that guides their decision on that issue.

The Petitioner's primary argument in his habeas petition is that his trial counsel was ineffective because he failed to offer such an instruction. During the omnibus hearing petitioner's trial counsel testified that he could not recall why he did not offer such an instruction.

The evidence in this case presented multiple issues for the jury. There is evidence that at a time separate from the sexual encounter the petitioner offered to help her with her grades or homework. The jury may have considered that circumstance in their decision whether at the time of the sexual act the victim was motivated by that promise. If she was so motivated, the jury might then conclude that the petitioner's relationship with her at the time of the act was that of a person in a position of trust, which would prohibit a sexual act with her that is not otherwise prohibited.

The jury might also conclude that if that was her motivation, she may have believed that the petitioner, as a school bus driver, was in a position of trust as to her. If the jury reaches that conclusion, it might also conclude that the petitioner actually did, at the time of the act alleged, exercise a degree of control over her that would satisfy the statutory requirement that she be in his "care, custody, or control." These issues belong to the jury.

There was evidence that the victim sneaked away from her home and was in the company of a number of other persons, thereby voluntarily removing herself from the guidance and protection of her parents, before her encounter with the petitioner. If the jury believed that she voluntarily removed herself from her parent's control and went various places before she entered the company of the petitioner, they might conclude that she was not at that time in his "care, custody, or control." That issue also belongs to the jury.

Petitioner's trial counsel did not offer an instruction that would guide the jury as to these issues and did not offer at the habeas hearing a strategically related explanation for his failure to do so.

Such an instruction might have been difficult for counsel to draft and for the trial court to analyze and rule upon. But if the necessary instruction had been drafted and offered, the trial court would have had the duty to rule upon it, and if conviction resulted the Supreme Court of Appeals would have had the opportunity to determine on direct appeal whether the instruction was correct. As it was, however, trial counsel did not offer it and so there was no trial court ruling that allowed the Supreme Court to evaluate whether the jury was instructed correctly.

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The court is mindful of syll. pt. 6, *State v. Miller*, cited above. Had trial counsel identified a strategic purpose that supported an election not to offer such an instruction, and if that strategic purpose had been within that which would have been employed by counsel acting with the required degree of skill and competence, such would not support a claim of ineffective assistance of counsel. In the present case, however, neither trial counsel nor the state in their resistance to the petition could identify such a strategic purpose.

It is also necessary, as required by syll. pt. 5, *State v. Miller*, to determine whether "but for counsel's unprofessional errors, the result of the proceedings would have been different." The trial was fundamentally flawed by the absence of jury instructions on a factual point that was critical not just to the determination of guilt, but to the question whether a crime had been committed at all. Under those circumstances there is a reasonable likelihood that a properly instructed jury dealing with this body of evidence might have come to a different conclusion.

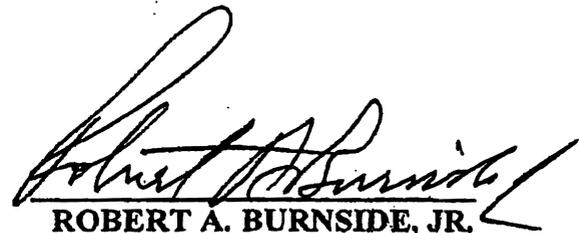
RULING AND ORDER

Upon these considerations, it is the opinion this court that the petitioner's conviction should be and it is hereby set aside and that petitioner should be and he is hereby granted a new trial.

The Circuit Clerk is directed to mail a copy of this order to the Prosecuting Attorney of Wyoming County and to counsel for Petitioner.

It is so **ORDERED**

ENTER: July 23, 2013


ROBERT A. BURNSIDE, JR.
CIRCUIT JUDGE

A TRUE COPY, ATTEST
DAVID "BUGS" STOVER, CLERK

This the 26 day of July, 2013

By J. M. M.
Deputy.