

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
LOGAN COUNTY**

STATE OF OHIO,

PLAINTIFF-APPELLANT,

CASE NO. 8-06-12

v.

JON C. STOUT,

OPINION

DEFENDANT-APPELLEE.

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas
Court**

**JUDGMENT: Judgment Affirmed in Part, Reversed in Part and
Cause Remanded**

DATE OF JUDGMENT ENTRY: November 20, 2006

ATTORNEYS:

**ERIN G. ROSEN
Assistant Attorney General
Reg. #0071156
30 East Broad Street, 14th Floor
Columbus, Ohio 43215
For Appellant**

**ERIC E. WILLISON
Attorney at Law
Reg. #0066795
625 City Park Avenue
Columbus, Ohio 43206
For Appellee**

ROGERS, J.

{¶1} Plaintiff-Appellant, the State of Ohio, appeals the judgment of the Logan County Court of Common Pleas, granting Defendant-Appellee's, Jon C. Stout's, pretrial motion to dismiss. The State asserts that the trial court erred in granting Stout's pretrial motion to dismiss because the indictment and amended bill of particulars were legally sufficient to put Stout on notice of the charges against him and that the trial court erred in granting Stout's pretrial motion to dismiss based upon factual determinations that should have been decided by the trier of fact at trial. Based on the following, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

{¶2} In January of 2006, the Logan County Grand Jury indicted Stout under a six count indictment, which included one count of Child Endangering in violation of R.C. 2919.22(A), a misdemeanor of the first degree, and two counts of Sexual Battery in violation of R.C. 2907.03(A)(5), felonies of the third degree.

{¶3} Specifically, the indictment provided, in pertinent part:

COUNT II.

Jon C. Stout, between the dates of August 17, 2006 and October 31, 2005, at the county of Logan aforesaid, did as a guardian, custodian, or person having custody or control, or person in loco parentis, of a child under the age of eighteen, to wit: date of birth 09/14/89; created a substantial risk to the health or safety to the child under the age of eighteen years of age or a mentally or physically handicapped child under the age of twenty-one years of age by violating a duty of care, protection, or support,

in violation of Ohio Revised Code §2919.22(A), Endangering Children, a misdemeanor of the first degree.

COUNT V.

Jon C. Stout, on or about the 30th day of September, 2005, at the county of Logan aforesaid, did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis, guardian, or custodian of the child, to wit: cunnilingus with a child, date of birth 09/14/89; in violation of Ohio Revised Code §2907.03(A)(5), Sexual Battery, a felony of the third degree.

COUNT VI.

Jon C. Stout, on or about the 30th day of September, 2005, at the county of Logan aforesaid, did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis, guardian, or custodian of the child, to wit: digital penetration with a child, date of birth 09/14/89; in violation of Ohio Revised Code §2907.03(A)(5), Sexual Battery, a felony of the third degree.

{¶4} In February of 2006, the State filed a bill of particulars. Stout later filed a Crim.R. 12 motion to dismiss the aforementioned counts of the indictment. In his motion, Stout argued that the indictment was legally insufficient for failing to explain basic facts upon which his status of “in loco parentis” is based and that he is not a person in loco parentis under R.C. 2907.03(A)(5) or R.C. 2919.22(A).

{¶5} In March of 2006, the State filed a motion in opposition of Stout’s Crim.R. 12 motion to dismiss and an amended bill of particulars. In its amended bill of particulars, the State provided:

Count Two:

On or about or between August 17, 2005 and October 31, 2005, the Defendant, Jon C. Stout, in Logan County, Ohio, did, as a guardian, custodian, or person having custody or control, or person *in loco parentis*, of a child under the age of eighteen, to wit: S.M. (DOB 9/14/89), created a substantial risk to the health or safety to the child under the age of eighteen years of age by violating a duty of care, protection or support, in violation of ORC 2919.22 (A), Endangering Children, a misdemeanor of the first degree. Specifically, the Defendant did during the time period alleged, while he was investigating a case that involved S.M. (DOB 9/14/89), drive her in his Logan County detective vehicle at speeds reaching in excess of one hundred miles per hour. The Defendant was acting as more than a detective, he was acting *in loco parentis*. He was the person S.M. confided to about her problems and issues. He was entrusted with her care and protection, given her medical issues. The parents of S.M. relied upon the Defendant to help with the emotional, psychological and physical healing process of S.M.

Count Five:

On or about September 30, 2005, the Defendant, Jon C. Stout, in Logan County, Ohio, did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis, guardian or custodian of the child, to wit: S.M. (DOB 9/14/89), in violation of ORC 2907.03(A) (5), Sexual Battery, a felony of the third degree. Specifically, the Defendant did engage in cunnilingus with S.M. (DOB 9/14/89), while they were in his sheriff's office issued vehicle. The Defendant was acting *in loco parentis* at the time of this event. He was the person S.M. confided to about her problems and issues. He was entrusted with her care and protection, given her medical issues. The parents of S.M. relied upon the Defendant to help with the emotional, psychological and physical healing process of S.M.

Count Six:

On or about September 30, 2005, the Defendant, Jon C. Stout, in Logan County, Ohio, did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis, guardian or custodian of the child, to wit: S.M. (DOB

9/14/89), in violation of ORC 2907.03(A) (5), Sexual Battery, a felony of the third degree. Specifically, the Defendant did digitally penetrate the vagina of S.M. (DOB 9/14/89), while they were in his sheriff's office issued vehicle. The Defendant was acting *in loco parentis* at the time of this event. He was the person S.M. confided to about her problems and issues. He was entrusted with her car and protection, given her medical issues. The parents of S.M. relied upon the Defendant to help with the emotional, psychological and physical healing process of S.M.

{¶6} In April of 2006, Stout filed a reply to the State's opposition to his motion to dismiss. Subsequently, without hearing, the trial court granted Stout's Crim.R. 12 motion to dismiss.

{¶7} It is from this judgment the State appeals, presenting the following assignments of error for our review:

Assignment of Error No. I

THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S PRE-TRIAL MOTION TO DISMISS BECAUSE THE INDICTMENT AND AMENDED BILL OF PARTICULARS WERE LEGALLY SUFFICIENT TO GIVE THE DEFENDANT THE NOTICE OF THE CHARGES AND PRESENTED THE BASIC FACTS IN SUPPORT OF THE DEFENDANT'S STATUS AS *IN LOCO PARENTIS*; THE COURT LOOKED BEYOND THE PLEADINGS IN DECIDING DEFENDANT'S MOTION TO DISMISS.

Assignment of Error No. II

THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S PRE-TRIAL MOTION TO DISMISS BASED UPON FACTUAL DETERMINATIONS THAT SHOULD BE DECIDED BY THE TRIER OF FACT AT TRIAL.

Assignment of Error No. I

{¶9} In its first assignment of error, the State argues that the trial court erred in granting Stout's pre-trial motion to dismiss. Specifically, the State asserts that the trial court erred because the indictment and amended bill of particulars were legally sufficient to put Stout on notice of the charges against him and presented the basic facts in support of Stout's status as in loco parentis and that the trial court erred when it looked beyond the pleadings in granting Stout's motion to dismiss.

{¶10} The mechanism governing pretrial motions to dismiss criminal indictments is found in Crim.R. 12(C). *State v. Riley*, 12th Dist. No. CA2001-04-095, 2001-Ohio-8618. Crim.R. 12(C) provides:

Pretrial motions. Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request *that is capable of determination without the trial of the general issue. The following must be raised before trial:*

* * *

(2) Defenses and objections based on defects in the indictment, information, or complaint * * *.

(Emphasis added).

{¶11} The Ohio Rules of Criminal Procedure do not provide for the equivalent of a civil motion for summary judgment. *State v. McNamee* (1984), 17 Ohio App.3d 175, 176. A motion to dismiss filed under Crim.R. 12 tests the sufficiency of the charging document, without regard to the quantity or quality of

the evidence which may eventually be produced by the state. *State v. Patterson* (1989), 63 Ohio App.3d 91, 95. If a motion to dismiss requires examination of evidence beyond the face of the complaint, it must be presented as a motion for acquittal under Crim.R. 29 at the close of the state's case. *State v. Varner* (1991), 81 Ohio App.3d 85, 86. Therefore, in addressing the defendant's motion to dismiss, the court is limited to determining whether the language within the indictment alleges the offenses, in this case sexual battery and endangering children. *Riley*, supra, citing *State v. Heebsh* (1992), 85 Ohio App.3d 551, 556.

{¶12} In the case sub judice, both parties rely on the Ohio Supreme Court's decision in *State v. Noggle*, 67 Ohio St.3d 31, 1993-Ohio-189. In *Noggle*, the Court's syllabus provides, in pertinent part:

2. Indictments based upon an alleged offender's status as a person in loco parentis should at least state the very basic facts upon which that alleged status is based.

Id. at paragraph two of the syllabus. Also, in its opinion, the Court provides:

Finally, ordinarily, an indictment against a defendant is sufficient if it states the charge against the defendant in the words of the statute. Crim.R. 7(B). However, in regard to this particular statute, the words used are not sufficient. The phrase "person in loco parentis" is a general phrase demanding specificity. Indictments based upon the alleged offender's status as a person in loco parentis should at least state the very basic facts upon which that status is based.

In this case the amended bill of particulars served the purpose of stating the basic facts supporting the allegation that Noggle was a person in loco parentis. The fact that Noggle was a teacher

and coach was insufficient to support an indictment based upon R.C. 2907.03(A)(5). The court of appeals correctly affirmed the trial court's dismissal. Accordingly, the judgment of the appellate court is affirmed.

Id. at 34. Based upon *Noggle*, Stout argues that the indictment does not provide the very basic facts upon which his status as in loco parentis is based in the aforementioned counts. Conversely, the State argues that its amended bill of particulars meets *Noggle's* special pleading requirement, relying on the language in the *Noggle* decision, "In this case the amended bill of particulars served the purpose of stating the basic facts supporting the allegation that Noggle was a person in loco parentis." Thus, under the State's interpretation, we would be required to interpret the Court's *Noggle* opinion in conflict with its second paragraph of the syllabus.

{¶13} However, the purpose of a bill of particulars is to provide a defendant with greater detail of the nature and causes of the charges against him. *State v. Lewis* (1993), 85 Ohio App.3d 29, 32, citing *State v. Gingell* (1982), 7 Ohio App.3d 364. And, it is well settled that a bill of particulars cannot save an invalid indictment, since a defendant cannot be "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell v. U.S.* (1962), 369 U.S. 749, 770; see, also, *United States v. Norris* (1930), 281 U.S. 619, 622, *Lewis*, 85 Ohio App.3d at 32 citing *Gingell*, 7 Ohio App.3d 364.

{¶14} Therefore, we must reject the State’s interpretation of *Noggle* and determine whether the indictment provided the “very basic facts” upon which Stout is alleged to be in loco parentis. We begin with the fifth and sixth counts of the indictment returned against Stout, which alleged that Stout committed sexual battery in violation of R.C. 2907.03(A)(5). The fifth and sixth counts of the indictment specified, in pertinent part,

COUNT V.

Jon C. Stout, * * * did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis * * *, to wit: cunnilingus with a child, date of birth 09/14/89 * * *.

COUNT VI.

Jon C. Stout,* * * did engage in sexual conduct with another, not his spouse, when the offender was the person in loco parentis, * * * to wit: digital penetration with a child, date of birth 09/14/89 * * *.

{¶15} Upon review of the indictment, we cannot find that counts five and six of the indictment returned against Stout provided “the very basic facts” upon which his alleged status as a person in loco parentis is based. Accordingly, we find that counts five and six of the indictment did not comply with the special pleading requirement as stated in *Noggle* and that the trial court did not err in granting Stout’s motion to dismiss with respect to counts five and six of the indictment returned against Stout.

{¶16} Next, we turn to the second count of the indictment returned against Stout, which alleged that Stout committed endangering children in violation of R.C. 2919.22(A). The second count of the indictment specified, in pertinent part:

COUNT II.

Jon C. Stout, * * * did as a guardian, custodian, or person having custody or control, or person in loco parentis, of a child under the age of eighteen, to wit: date of birth 09/14/89; created a substantial risk to the health or safety to the child under the age of eighteen years of age * * * by violating a duty of care, protection, or support.

{¶17} Upon review of the indictment, we note that the second count states the charge against Stout in the words of R.C. 2919.22(A). *Noggle*, 67 Ohio St.3d at 34. Also, unlike R.C. 2907.03(A)(5), R.C. 2919.22(A) includes “person[s] having custody or control” over the other person as potential offenders of endangering children. “Custody and control” as used in R.C. 2919.22(A) has been defined as more than a casual relationship but something less than being in loco parentis. *State v. Schoolcraft* (May 29, 1992), 11th Dist. No. 91-P-2340; *State v. Kirk* (Mar. 24, 1994), 10th Dist. No. 93AP-726; *State v. Smith* (Jan. 25, 1996), 8th Dist. No. 68745. Therefore, even if we were to extend the requirements of *Noggle* to require that the indictment provide “the very basic facts” upon which Stout is alleged to be in loco parentis, the indictment would still satisfy the requirements of Crim.R. 7(B) because the language of the indictment states the charge against Stout using the words of R.C. 2919.22(A) and Stout could have had “custody or

control” over the child without being a person in loco parentis to the child. Thus, the trial court erred in granting Stout’s motion to dismiss the second count of the indictment.

{¶18} Having found that the trial court did not err in granting Stout’s motion to dismiss with respect to the fifth and sixth counts of the indictment, but did err in granting Stout’s motion to dismiss with respect to the second count of the indictment, the State’s assignment of error is overruled in part and is sustained in part.

Assignment of Error No. II

{¶19} In its second assignment of error, the State argues that the trial court erred in granting Stout’s motion to dismiss based upon factual determinations that should be decided by the trier of fact. Our disposition of the State’s first assignment of error renders the second assignment of error moot and we decline to address it. App.R. 12(A)(1)(c).

{¶20} Having found no error prejudicial to Appellant herein in the particulars assigned and argued in the first assignment of error with respect to the fifth and sixth counts of the indictment against Stout, but having found error prejudicial to Appellant herein in the particulars assigned and argued in the first assignment of error with respect to the second count of the indictment against

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Stout, we affirm in part, reverse in part, and remand the matter for further proceedings consistent with this opinion.

*Judgment Affirmed in Part,
Reversed in Part and
Cause Remanded.*

BRYANT, P.J., concurs.

SHAW, J., concurs in Judgment Only.

/jlr