

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

P.O. Box 746
COURTHOUSE
GEORGETOWN, DE 19947

June 29, 2004

Joe Hurley, Esquire
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Wilmington, DE 19801

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Department of Justice
114 East Market Street
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RE: State of Delaware v. Mark A. Atwell
Def. ID# 0312016278

Date Submitted: April 2, 2004

Dear Counsel:

This is my decision on Mark A. Atwell's ("Atwell") Motion to Dismiss counts three and four of the Indictment. Atwell's Motion to Dismiss is granted for the reasons stated herein.

STATEMENT OF THE CASE

Atwell was charged by Indictment on January 12, 2004 with two counts of Providing Alcohol to a Minor, two counts of Distributing Tobacco Products to a Minor, seven counts of Unlawful Sexual Contact in the Second Degree, seven counts of Rape in the Fourth Degree, three counts of Rape in the First Degree, and three counts of Endangering the Welfare of a Child. Atwell filed a Motion to Dismiss the two counts of Distributing Tobacco Products to a Minor on March 16, 2004. Atwell alleges that the offenses are lesser-included offenses of Count 22, Endangering the Welfare

of a Child by providing cigarettes to the child, and, as such, are multiplicitous and violate 11 *Del. C.* § 206.

DISCUSSION

Atwell argues that he may not be convicted of both Distributing Tobacco Products to a Minor¹ and Endangering the Welfare of a Child² by providing cigarettes to the child because one is a lesser- included offense of the other. 11 *Del. C.* § 206 states that a defendant may not be convicted of both offenses when one offense is “included” in the other. More specifically, 11 *Del. C.* § 206 provides the following:

(a) When the same conduct of a defendant may establish the commission of more than 1 offense . . . [t]he defendant may not . . . be convicted of more than one offense if:

(1) One offense is included in the other, as defined in subsection (b) of this section

(b) An offense is so included [in another] when:

(1) It is established by the proof of the same or less than all the facts required to establish the commission of the offense charged; or

(2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(3) It involves the same result but differs from the offense charged only in the respect that less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

¹Under 11 *Del. C.* § 1116(a), “[i]t shall be unlawful for any person to sell or distribute any tobacco product to another person who has not attained the age of 18 years or to purchase any tobacco product on behalf of another such person, except that this section shall not apply to the parent or guardian of another such person.”

²Under 11 *Del. C.* § 1102(a), “[a] person is guilty of endangering the welfare of a child when:

(1) Being a parent, guardian or any other person who has assumed the responsibility for the care or supervision of a child less than 18 years old the person:

a. Knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of the child

It is necessary that the Court “apply all three prongs of subsection (b) before concluding that an offense is not a lesser-included offense of another.”³

Under 11 *Del. C.* § 206, Distributing Tobacco Products to a Minor is a lesser-included offense of Endangering the Welfare of a Child by providing cigarettes to the child. Both offenses require proof of the same facts under subsection (b)(1). The elements necessary to prove Distributing Tobacco Products to a Minor under 11 *Del. C.* § 1102 include (1) the child was less than 18 years of age, and (2) Atwell provided tobacco (cigarettes) to the child. Although the elements necessary to prove Endangering the Welfare of a Child under 11 *Del. C.* §1116(a)(1) are broad, the offense listed in the Indictment is more narrowly tailored to require proof of the following: (1) the child was less than 18 years of age, (2) Atwell provided cigarettes to the child, and (3) that act was likely to be injurious to the physical, mental or moral welfare of the child. Both offenses require the facts to show both that the child was under the age of 18 and that Atwell provided the child with tobacco products, in this case, cigarettes. Since the first prong of subsection (b) has been established, it is not necessary to proceed further. Accordingly, I conclude that Distributing Tobacco Products to a Minor is a lesser-included offense of Endangering the Welfare of a Child by providing cigarettes to the child.

³*State v. Willis*, Del. Super. Ct., Cr. A. No. IN95-01-0246, Cooch, J. (Nov. 21, 1995) Mem. Op. at 9.

CONCLUSION

Atwell's Motion to Dismiss is granted for the reasons stated herein.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

ESB:tl

cc: Prothonotary's Office