

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN D. SMITH,)
) No. 367, 2000
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for the Sussex County
)
 STATE OF DELAWARE,) Cr.A. No. IS98-12-0277 through 0279
) Cr. ID No. 9809009063
 Plaintiff Below,)
 Appellee.)

Submitted: July 10, 2001
Decided: August 7, 2001

Before **WALSH, BERGER** and **STEELE**, Justices.

ORDER

This 7th day of August, 2001, it appears to the Court that:

1. Stephen D. Smith appeals the judgment of Superior Court after the Court convicted him of three counts of Unlawful Sexual Intercourse Third.

2. Smith alleges that the Superior Court erred when it denied his Motion to Dismiss Counts 2 and 3 of the indictment for lack of specificity in that the counts charged a range of dates so broadly expansive in time that it prejudiced his ability to defend.

3. We conclude that where Smith's defense focused on a complete denial of any interaction with the victim consistent with that alleged in the indictment at any time, the testimony of the victim focused on incidents surrounding events

known to have occurred on dates certain and Smith's Motion attacked the State's ability to establish that the victim was under sixteen, as opposed to difficulty in preparing a defense, he suffered no unfair prejudice. Therefore, we affirm the Superior Court convictions.

4. Interestingly, although Smith urges a reversal on appeal based upon an alleged difficulty in defending against charges subsumed within a broad range of dates, the focus of both the argument below and, consequently, the Superior Court's ruling was an alleged requirement that dates certain be provided in order to establish that the victim was under sixteen at the time of the offenses. Indeed, the Court's ruling makes that clear:

Mr. Haller, you had a motion to dismiss which I'm going to deny. In the indictment, there were three separate counts, one alleging a specific date; Counts 2 and 3 alleged a range of dates. And your argument was that the date wasn't [was] an essential element of the crime and it had to be proven on that particular day. I do think that a date or dates are important, because the State has to show that the crimes, the alleged crimes took place while the victim was under the age of 16. But given the one specific date and the range of dates in Counts 2 and 3, under any scenario, or under that range of dates, the victim was under the age of 16 at the time. So based on that, I'm going to deny your motion.¹

5. We review the Superior Court's denial of the Motion to Dismiss under an abuse of discretion standard.

¹ *State v. Smith*, Del. Super., Cr. A. Nos. IS98-12-0277-0279, Bradley, J., at *97-98 (May 22, 2000).

6. The Appellant argues for the first time on appeal that lack of specificity on the dates of two counts of an indictment alleging unlawful sexual intercourse prejudiced his defense of denial and/or alibi. However, before trial he asked for an outright dismissal on the apparent theory that the dates were so broadly stated that they did not specifically designate a date certain when the victim's age could be determined as of the time of the offense. The Superior Court denied the motion based on that theory at the conclusion of trial.

7. The broadly based statement of the range of dates of the offenses in Counts 2 and 3 did not prejudice the defense's preparation given the defense theory that no incident of the kind described in the indictment ever occurred and that the accusations against Smith were fabricated because of a custodial dispute between him and his former wife, the victim's sister. Further, the victim's testimony concerning the incidents closely tracked the dates of known events, giving the defense, following the response to its Request for a Bill of Particulars, ample time to develop an alternative alibi defense or request more time to do so. The defense made a sound tactical decision to attack the face of the indictment and to proceed to trial on a general denial. Notwithstanding that reasonable tactical decision, the Superior Court fairly assessed the credibility of the victim and Smith and resolved credibility against him. The record supports that conclusion. Furthermore, the

Court correctly addressed the Motion to Dismiss based on the argument then made and denied it in an exercise of the Court's sound discretion.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Justice