

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 0066

STATE OF LOUISIANA

VERSUS

MARC A. FRUGE

Judgment Rendered: November 2, 2012

Appealed from the
20th Judicial District Court
In and for the Parish of East Feliciana
State of Louisiana
Case No. 08-CR-127

The Honorable George H. Ware, Jr., Judge Presiding

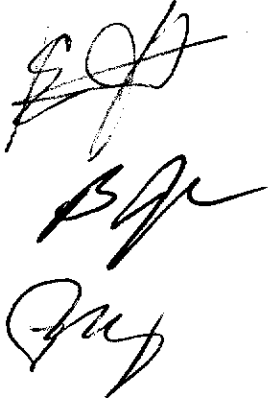
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BEFORE: CARTER, C.J., GUIDRY, AND GAIDRY, JJ.



GAIDRY, J.

Defendant, Marc A. Fruge, was charged by bill of information with one count of felony carnal knowledge of a juvenile, a violation of La. R.S. 14:80. He pled not guilty. Defendant subsequently filed a motion to quash alleging that the combined effect of La. R.S. 14:80, the statute under which he was billed, and La. R.S. 15:542, which would require his registration as a child predator in the event of his conviction, was unconstitutional as cruel and unusual punishment because the state would not have to demonstrate any element of intent in proving defendant's guilt. The trial court denied defendant's motion to quash. Defendant withdrew his former plea of not guilty and entered a plea of nolo contendere pursuant to a plea agreement with the state, reserving his right to appeal the trial court's denial of his motion to quash under *State v. Crosby*, 338 So.2d 584 (La. 1976). Under the terms of the plea agreement, the trial court sentenced defendant to three years imprisonment at hard labor, all suspended; placed defendant on three years active probation with special conditions, including the performance of community service and the payment of a fine and costs; and ordered defendant to comply with the mandatory reporting requirements of La. R.S. 15:542. Defendant now appeals, alleging one assignment of error. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

Because defendant entered a plea of nolo contendere, no facts were developed at trial. The following facts are adapted from the stipulations entered into between defendant and the state, from testimony given at a motion to suppress hearing, and from defendant's own appellate brief.

Defendant met the victim, K.M.,¹ on an adult dating website. Although K.M. represented herself to be twenty-one years old on this website, she was in fact only fourteen years old. Subsequently, on January 5, 2008, defendant went to the victim's home in East Feliciana Parish. Defendant and the victim went into the woods near the victim's home, and they engaged in sexual intercourse. At the time of the incident, defendant was thirty years old.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant states that the trial court erred in failing to grant his motion to quash.² Defendant argues that the mandatory requirement that he register as a sex offender or child predator under La. R.S. 15:542 for his conviction under La. R.S. 14:80 constitutes cruel and unusual punishment. More specifically, defendant contends that because La. R.S. 14:80 contains no scienter requirement, and because he alleges that he committed this offense out of a pure mistake of fact, his mandatory registration as a sex offender or child predator does not advance the legislature's purpose in requiring such registration.

Under La. R.S. 15:542(A)(1)(a), an adult who has been convicted of a sex offense as defined in La. R.S. 15:541 shall be required to register and provide notification as a sex offender or child predator. Felony carnal knowledge of a juvenile, a violation of La. R.S. 14:80, is defined as a sex offense in La. R.S. 15:541(14.1), the provision in effect on the date of

¹ At the time of the offense, the victim was a minor. In accordance with La. R.S. 46:1844(W), the victim herein is referenced only by her initials, or referred to as "the victim."

² We note that we doubt whether defendant's instant argument was properly raised in a motion to quash because it does not allege any ground for a motion to quash under La. Code Crim. P. arts. 532 or 534. However, because defendant's plea was conditioned upon his right to seek review of the trial court's denial of his motion to quash alleging this argument, we address defendant's argument as though it had been properly raised in the trial court.

commission of defendant's crime, because of its inclusion in Part V of Chapter 1 of Title 14 of the Louisiana Revised Statutes. At the time of defendant's offense, the only exception to the registration requirements for those offenders who have been convicted of felony carnal knowledge of a juvenile was found in La. R.S. 15:542(F)(2). Under La. R.S. 15:542(F)(2) (prior to amendment by 2008 La. Acts No. 814, § 1), "[u]pon motion by the district attorney, the court may waive sex offender registration and notification requirements . . . for a person convicted of felony carnal knowledge of a juvenile . . . when the victim is at least thirteen years of age and the offender was not more than four years older than the victim." Under current law, La. R.S. 15:542(F)(3)(a) allows "[a]ny person who was convicted of carnal knowledge of a juvenile . . . prior to August 15, 2001, [to] petition the court of conviction to be relieved of the sex offender registration and notification requirements . . . if the offense for which the offender was convicted would be defined as misdemeanor carnal knowledge of a juvenile ([La.] R.S. 14:80.1) had the offender been convicted on or after August 15, 2001." Because of the facts of the instant case, defendant was unable to petition for either of these waivers of registration and notification.

In La. R.S. 15:540, the legislature set forth its findings and stated its purpose in requiring sex offenders to register with law enforcement and to notify the public of their offenses:

A. The legislature finds that sex offenders, sexually violent predators, and child predators often pose a high risk of engaging in sex offenses, and crimes against victims who are minors even after being released from incarceration or commitment and that protection of the public from sex offenders, sexually violent predators, and child predators is of paramount governmental interest. The legislature further finds that local law enforcement officers' efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses and crimes against victims who are minors, are impaired by the lack of information

available to law enforcement agencies about convicted sex offenders, sexually violent predators, and child predators who live within the agency's jurisdiction, and the penal and mental health components of our justice system are largely hidden from public view and that lack of information from either may result in failure of both systems to meet this paramount concern of public safety. Restrictive confidentiality and liability laws governing the release of information about sex offenders, sexually violent predators, and child predators have reduced willingness to release information that could be appropriately released under the public disclosure laws, and have increased risks to public safety. Persons found to have committed a sex offense or a crime against a victim who is a minor have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government. Release of information about sex offenders, sexually violent predators, and child predators to public agencies, and under limited circumstances to the general public, will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals.

B. Therefore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by requiring sex offenders, sexually violent predators, and child predators to register with state and local law enforcement agencies and to require the exchange of relevant information about sex offenders, sexually violent predators, and child predators among state, local, and federal public agencies and officials and to authorize the release of necessary and relevant information about sex offenders, sexually violent predators, and child predators to members of the general public as provided in this Chapter.

Defendant argues that the lack of a scienter requirement in La. R.S. 14:80 undermines the legislature's stated reasons for requiring sex offender registration. Defendant contends that the legislature did not intend "to intrude on the privacy of someone who only accidentally, unknowingly, or through private entrapment, committed the crime of consensual intercourse without knowing and without intending to couple with a juvenile." Defendant further asserts that nothing in the legislature's findings and purpose "suggests that someone who may have been tricked into having sex with a juvenile poses a high risk of engaging in future sex offense or crimes

against minors after being released from incarceration or commitment.” Based on these arguments, defendant believes that the mandatory sex offender registration requirements for a person convicted of an offense under La. R.S. 14:80 are unconstitutionally punitive.

In *State v. Granier*, 99-3511 (La. 7/6/00), 765 So.2d 998, the Louisiana Supreme Court held that La. R.S. 14:80 was constitutional despite its lack of a scienter requirement. The Court reasoned as follows:

Statutes are presumed valid and their constitutionality should be upheld whenever possible. *State v. Griffin*, 495 So.2d 1306, 1308 (La. 1986). Louisiana criminal statutes must be “given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision.” La. R.S. 14:3. Moreover, the Louisiana Legislature has sole authority under the Louisiana Constitution to define conduct as criminal and to provide penalties for such conduct. La. Const. art. 3, § I. In fact, La. R.S. 14:8(2) provides that criminal conduct may consist of a “mere act or failure to act that produces criminal consequences, where there is no requirement of criminal intent . . .” Additionally, La. R.S. 14:11 provides that in some crimes “no intent is required.” Thus, the Louisiana Legislature has determined that specific or general intent is not a necessary element of every crime.

While offenses that dispose of a scienter requirement are not favored, the United States Supreme Court has noted that the legislatures' authority to define a criminal offense includes the power to “exclude elements of knowledge and diligence from its definition.” *Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 242, 2 L.Ed.2d 228 (195[7]). See also *Powell v. Texas*, 392 U.S. 514, 545, 88 S.Ct. 2145, 2160, 20 L.Ed.2d 1254 (1968) (Black, J. concurring) (“[L]egislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime.”). Additionally, the Court has also specifically recognized certain exceptions to the requirement of *mens rea* as an element of criminal conduct, including “sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent.” *Morissette v. United States*, 342 U.S. 246, 251 n.8, 72 S.Ct. 240, 244 n.8, 96 L.Ed. 288 (1952). See also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (quoting *Morissette*, supra). Moreover, the majority rule in state courts across the nation is that a defendant's knowledge of the age of the victim is not an essential element of statutory rape. In many of these states,

proof of statutory rape requires merely proof of an act of sexual intercourse and proof that the victim is below the prohibited age.

As to the specific criminal statute in this case, as early as 1938, this court explained that the crime of carnal knowledge of a juvenile does not require felonious intent or guilty knowledge, but that the simple perpetration of the act itself constitutes the offense. *State v. Dierlamm*, 189 La. 544, 180 So. 135 (1938). Later, this court stated that in the interest of protecting juveniles, historically recognized as a special class of persons in need of protection, the legislature may dispense with the knowledge requirement as to the age of the juvenile in certain crimes. *State v. Elias*, 357 So.2d 275 (La. 1978) (“Although the presence of a ‘vicious will’ or *mens rea* has long been a requirement of criminal responsibility, many exceptions have been recognized.”), overruled on other grounds by, *State v. Bosworth*, 373 So.2d 152 (La. 1979).

* * *

In Louisiana's statute, the crime of carnal knowledge of a juvenile requires proof of consensual sexual intercourse between a person over the age of 17 with a person 12 years old or older, but under the age of 17. Additionally, the age difference between the two has to be greater than two years and the juvenile must not be the spouse of the offender. Yet, nowhere in the statute is knowledge of the juvenile's age required. As in *Dierlamm* and *Elias*, we hold that knowledge of the juvenile's age is not an element of certain crimes involving juveniles, including the crime of carnal knowledge of a juvenile.

* * *

In adopting this statute, the legislature has made the determination to protect juveniles below a specified age from sexual intercourse. The policy underlying such a statute is a presumption that, because of their innocence and immaturity, juveniles are prevented from appreciating the full magnitude and consequences of their actions. At the heart of these types of statutes is the concern that juveniles should not be exploited for sexual purposes regardless of their “consent.” Although we recognize that some juveniles below this age are able to convincingly portray themselves as being 17 years of age or older, the burden falls upon the “adult” to determine that the other person is the legal age before engaging in sexual relations.

Granier, 765 So.2d at 1000-01 (emphasis in original, footnote omitted).³

Clearly, then, the supreme court has accepted as constitutional the lack of a scienter requirement in the felony carnal knowledge of a juvenile statute.

Still, defendant contends that the registration and notification requirements that follow his conviction for the instant offense are unconstitutional because of his stated lack of knowledge of the victim's actual age. We disagree. Defendant's actions leading to his conviction for the instant offense demonstrate that, at best, he lacks the judgment to assess the true age of a potential sexual partner. At worst, defendant's actions give rise to the conclusion that he actively intended to engage in sexual intercourse with a juvenile. We agree with the Supreme Court's statement in *Granier* that the burden falls upon the "adult" to determine that the other person is the legal age before engaging in sexual relations. *Granier*, 765 So.2d at 1001. In this case, defendant admits that he failed to take that step, and now he wishes to escape the mandatory reporting and notification requirements of La. R.S. 15:542 because of that exercise of ignorance. The legislature has not seen fit to allow for waivers of the reporting and notification requirements in factual situations where a defendant simply makes a "mistake" in committing the crime of felony carnal knowledge of a juvenile. We decline to allow such a waiver here.

Further, we have previously stated that the reporting and registration requirements of La. R.S. 15:542 were enacted not as a punishment, but

³ As an aside, we note that the provision under which defendant was convicted, La. R.S. 14:80 (prior to amendment by 2008 La. Acts No. 331, § 1), prohibited consensual sexual intercourse between: 1) a person who was nineteen years of age or older and a person who was thirteen years of age or older but less than seventeen years of age, when the victim was not the spouse of the offender; and 2) a person who was seventeen years of age or older and a person who was thirteen years of age or older but less than fifteen years of age, when the victim was not the spouse of the offender. La. R.S. 14:80(A)(1) & (2) (prior to amendment by 2008 La. Acts No. 331, § 1). However, this change in the felony carnal knowledge of a juvenile statute, as it was discussed in *Granier*, does not affect the validity of the Supreme Court's discussion of the statute's constitutionality.

rather to protect communities, to aid police in their investigation of sex offenders, and to enable quick apprehension of sex offenders. See *State v. Richard*, 2001-1112 (La. App. 1st Cir. 2/15/02), 812 So.2d 737, 740, writ denied, 2002-1264 (La. 11/22/02), 829 So.2d 1038.

This assignment of error lacks merit.

DECREE

For the foregoing reasons, we affirm defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.