STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LAWRENCE B. SCHAUB, Defendant-Appellant.	FOR PUBLICATION November 15, 2002 9:10 a.m. No. 231009 Macomb Circuit Court LC No. 00-001037-AR Updated Copy February 14, 2003

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

HOEKSTRA, J.

Defendant's appeal is before us by an order of the Supreme Court that, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *People v Schaub*, 463 Mich 910 (2000). The issue presented on appeal is, in essence, whether the prosecution introduced sufficient evidence at the preliminary examination to require defendant to stand trial on the charge of child abandonment, MCL 750.135. After taking testimony at the preliminary examination, the district court dismissed the charge. The prosecution appealed to the circuit court and that court reversed the order of the district court and reinstated the charge against defendant. On application for interlocutory leave to appeal, this Court denied leave. *People v Schaub*, unpublished order of the Court of Appeals, entered October 9, 2000 (Docket No. 229502). After consideration of the merits of the appeal, we agree with defendant and reverse the circuit court's order and remand the matter for further proceedings.

The charge against defendant of child abandonment stems from an allegation that defendant transferred possession of his ten-month-old daughter to an undercover police officer for financial gain. At the preliminary examination, the prosecution introduced testimony from defendant's daycare provider, who had contacted the police after defendant asked her if she knew anyone who wanted to buy his youngest child, and a police officer, who had posed as a well-to-do real estate broker that desired to obtain a baby for his childless "son" and "daughter-in-law." These witnesses testified that defendant willingly agreed to sell his daughter for $60,000 without verifying the background of the prospective buyer and his "son" and "daughter-in-law" and to relinquish all his parental rights to the child. After negotiating the terms and conditions of the "sale," defendant gave his daughter to a police officer posing as the buyer's son and received in exchange $10,000 in cash and the promise of an additional $50,000 within two days. Defendant

also reduced to writing the financial terms of the agreement. The undercover police officer "buyer" testified that the child was never without care, having been transferred directly from defendant's presence to the buyer's "son." In addition, defendant informed them of the child's food requirements and discussed feeding and other procedures.

After hearing the witnesses' testimony and the arguments of the parties, the district court dismissed the child abandonment charge against defendant. The district court found that the prosecution had not met its burden of proof to show evidence of the elements of child abandonment. Specifically, the district court found that the term "wholly abandoned" in the child abandonment statute indicated placing the child in a situation where there is no one to care for it, and concluded that at no time was the child placed in a situation where she was without care.

The prosecution appealed as of right to the circuit court, and that court reversed the district court's order dismissing the child abandonment charge. The circuit court found that the district court erred in its interpretation of the child abandonment statute. According to the circuit court, "intent to wholly abandon" concerns only the defendant's conduct and the defendant's actions "must be analyzed without reference to the likelihood or unlikelihood that his child would befall harm at the hands of the prospective parents." The circuit court concluded that the prosecution presented sufficient evidence on that element to bind over defendant for trial. In addition, the circuit court found that the element of exposure was adequately shown by defendant's failure to protect his daughter from danger by failing to make reasonable inquiries into the moral and financial fitness of the prospective parents.

On appeal, defendant argues that the circuit court erred in reversing the district court's dismissal of the child abandonment charge because the circuit court's interpretation of the elements of child abandonment was incorrect. Specifically, the parties dispute whether the evidence established the elements of (1) exposure and (2) intent to wholly abandon. Ordinarily, the decision of the district court on a motion to bind over is reviewed for an abuse of discretion. *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001). However, here the decision to deny binding over defendant involved a determination by the district court that defendant's alleged conduct did not fit within the scope of the child abandonment statute, which raises a question of statutory interpretation that we review de novo. *Id.*

At the time that the alleged offense occurred, the child abandonment statute, MCL 750.135, provided:

> Any father or mother of a child under the age of 6 years, or any other person who shall expose such child in any street, field, house or other place, with intent to injure or wholly to abandon it, shall be guilty of felony, punishable by imprisonment in the state prison not more than 10 years.

MCL 750.135 has remained basically unchanged since it was first interpreted in 1858, in *Shannon v People*, 5 Mich 71 (1858).[1] We are aware of no other precedential Michigan case that has addressed the statute. In *Shannon*, our Supreme Court explained that once the person that is alleged to have abandoned the child is found to be either the child's parent or guardian, there are two additional elements of the crime of child abandonment. These elements are (1) exposing the child and (2) the intent to wholly abandon the child. *Id.* at 81, 89. According to the *Shannon* Court, "to 'expose' the child is the substantive act—the 'intent to abandon' is the secondary ingredient; both must concur to complete the offense." *Id.* at 89.

Here, with respect to whether defendant intended to wholly abandon the child, we agree with the circuit court that sufficient evidence was introduced to satisfy that element of the charged offense. The proofs showed that defendant sold his child to an undercover police officer for $10,000 cash and a note for $50,000, with the understanding that defendant did not retain any ability to visit the child or exercise his parental rights. The police officer testified that defendant was informed and agreed that the police officer's "family" was planning to raise the child as their own, without any intervention by defendant. From this evidence it is reasonable to conclude that defendant intended to "renounce all care or protection of" the child. See *id.* Although defendant

---

[1] The statute, as it read in 1858, stated:

> "If the father or mother of any child under the age of six years, or any person to whom such child shall have been confided, shall expose such child in any street, field, house, or other place, with the intent wholly to abandon it, he or she shall be punished by imprisonment in the state prison not more than ten years." [*Shannon, supra* at 81.]

In relevant part, the statute currently reads:

> A father or mother of a child under the age of 6 years, or another individual, who exposes the child in any street, field, house, or other place, with intent to injure or wholly to abandon the child, is guilty of a felony, punishable by imprisonment for not more than 10 years. [MCL 750.135(1).]

Further, in 2000, the statute, MCL 750.135, was amended to add the following section encouraging parents of unwanted newborns to deliver them to emergency service providers instead of abandoning them:

> (2) Except for a situation involving actual or suspected child abuse or child neglect, it is an affirmative defense to a prosecution under subsection (1) that the child was not more than 72 hours old and was surrendered to an emergency service provider under chapter XII of the probate code of 1939, 1939 PA 288, MCL 712.1 to 712.20. A criminal investigation shall not be initiated solely on the basis of a newborn being surrendered to an emergency service provider under chapter XII of the probate code of 1939, 1939 PA 288, MCL 712.1 to 712.20.

Emergency service providers are defined in subsection 3 of the statute, MCL 750.135(3).

asked for the address where the child would be located, the record reveals that the reason that defendant requested that information was to cover up the sale, if the child's mother returned from Texas and wanted to see her. It is clear from the evidence that defendant did not intend to participate in the child's life after the sale. Therefore, we conclude that the prosecution's proofs established the element that defendant intended to wholly abandon his daughter.

However, we conclude that the evidence presented did not establish the element of exposure.[2] With regard to exposure, the *Shannon* Court stated:

> The connection in which this section stands in our statute, in the chapter entitled, "*Of Offenses against the Lives and Persons of Individuals*," as well as the severity of the punishment, we think very clearly indicate that the exposure contemplated by this section must be such as may subject the child to hazard of personal injury—such as may peril the life or health of the child, or produce severe suffering or serious bodily harm; and, hence, that to leave a child, with the intent wholly to abandon it, "in a house (or other place) where it would be certain to be cared for," would not constitute the exposure contemplated by the statute.

---

[2] Although the dissent states that "the *Shannon* Court's definition of the term 'expose' is dicta," *post* at ___, we disagree. In *People v Higuera*, 244 Mich App 429, 437-438; 625 NW2d 444 (2001), this Court explained:

> Black's Law Dictionary (7th ed) defines obiter dictum as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." The Michigan Supreme Court has declared, however, that " '[w]hen a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.' " *Detroit v Michigan Public Utilities Comm*, 288 Mich 267, 299-300; 286 NW 368 (1939), quoting *Chase v American Cartage Co, Inc*, 176 Wis 235, 238; 186 NW 598 (1922). A decision of the Supreme Court is authoritative with regard to any point decided if the Court's opinion demonstrates "application of the judicial mind to the precise question adjudged, regardless of whether it was necessary to decide the question to decide the case." *People v Bonoite*, 112 Mich App 167, 171; 315 NW2d 884 (1982).

We believe that the *Shannon* Court's analysis with respect to the term "expose" in the statute under which the defendant was charged is authoritative. After finding one exception decisive to the cause, the Court continued to address, discuss, and decide other issues that were germane to the controversy. As the *Shannon* Court itself stated, "there are other important questions presented by the exceptions . . . ." *Shannon, supra* at 82, 88. We believe that the *Shannon* Court's analysis is binding. *Higuera, supra* at 437.

> We can not suppose the legislature intended to inflict so severe a punishment, to protect "persons not parents or guardians from being burdened with the care and custody of children," if they choose to assume that care and custody; or, in other words, from an unexpected demand upon their benevolence, from which they might rid themselves at any time by applying to the officers having charge of the poor. Such severity, for such a purpose, would be unprecedented in the history of legislation. On the other hand, it is perfectly clear that no actual injury need ensue from the exposure. *Id*. at 90.

The Court then looked further at the Legislature's intent in passing the child abandonment statute, concluding that "[t]he object of the statute obviously was to meet the exposure in injury *in limine;* to prevent the hazard of injury, and to punish as a crime the act creating the hazard." *Id.* at 91. The Court continued:

> The question, therefore, upon this point, is simply this: Did the acts of the party leaving or abandoning the child, viewed in connection with the time, place, and all the accompanying and surrounding circumstances, subject the child to the hazard of such personal injury? If so, this is an exposure. . . .We do not intend, by this, to say that a bare *possibility* of injury would constitute the exposure; but the only safe and practical rule upon this point, we think, is this: If, from the time, place, and manner of leaving the child—its age, dress, the state of the weather, and all the circumstances surrounding and accompanying the transaction—the jury shall believe that there was reasonable ground to apprehend, or fear, that such injury might thereby happen to the child, then, if accompanied with the intent wholly to abandon, it is an exposure within the statute, and the crime is complete; but if, judging from the like premises, there was no reasonable ground to fear or apprehend that such injury might occur, then the exposure required by the statute did not exist. This may be rendered more definite by saying, that if the child be left at such a time, in such a place, and under such circumstances, as would render a parent, or other person (to whom it is confided) of ordinary prudence and humanity, reasonably apprehensive of such injury to the child, then the hazard may be said to exist, and it is an exposure within the statute.
>
> * * *
>
> *No parent, or other person entrusted with the custody and protection of helpless infancy, can be permitted to divest himself of the responsibility which this trust imposes, until that custody and protection have been committed to or assumed by other hands. And if, in the attempt to throw off the responsibility, he abandons the child, he must be required first to see that there is at least a reasonable certainty that some other person will assume it before the risk of injury shall occur from the abandonment;* he must be held to the highest degree of diligence. The safety of a human being depends upon his acts. The law extends its protection only to acts which are legal; he is in the performance of an illegal act—he has renounced the protection of the law, and must look to his own acts

and his own diligence alone to protect him from criminal responsibility. [*Id.* at 91-92, 95-96 (emphasis supplied).]

From *Shannon*, it is apparent that the child abandonment statute was implemented to prevent young children from being left unattended, with the intent to wholly abandon them, without some arrangements being made to ensure the children's safety and minimize the hazards of personal injury from the abandonment. Although society may have changed since 1858, the statute has remained basically the same, and we are bound by our Supreme Court's interpretation of the statute. See *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000). Here, unlike the circuit court, we conclude that defendant's minimal inquiry into the moral and financial background of the police officer and his "family" cannot be construed as "exposing" the child to the possibility of personal injury as anticipated under this statute. The testimony at the preliminary examination demonstrated that defendant handed over his child to a person to care for her. Under these circumstances, there is no basis on which to find that the child would be left without care, putting the child at risk of personal injury from abandonment. Although defendant's actions were repugnant, the evidence does not support the required statutory element of exposure as interpreted by our Supreme Court in *Shannon*. Therefore, the circuit court's reversal of the district court's order dismissing the charge against defendant is reversed.

In response to this case and the publicity it generated, the Legislature enacted with unusual quickness a specific criminal statute that prohibits the sale or purchase of people, MCL 750.136c.[3] While the ex post facto guarantees of our state (Const 1963, art 1, § 10) and federal (US Const, art I, § 10) constitutions bar defendant's prosecution under this new criminal provision, others who commit the proscribed conduct after the effective date of the act are subject to the new criminal penalties.

In addition, defendant may have committed a common-law felony by his attempt to sell his child. In particular, MCL 750.505 provides:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison

---

[3] MCL 750.136c provides:

(1) A person shall not transfer or attempt to transfer the legal or physical custody of an individual to another person for money or other valuable consideration, except as otherwise permitted by law.

(2) A person shall not acquire or attempt to acquire the legal or physical custody of an individual for payment of money or other valuable consideration to another person, except as otherwise permitted by law.

(3) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $100,000.00, or both.

not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.

See, generally, *People v Coutu (On Remand)*, 235 Mich App 695, 704-707; 599 NW2d 556 (1999); *People v Cunningham*, 201 Mich App 720, 722-723; 506 NW2d 624 (1993).

Because defendant has not been charged with committing a common-law felony and the prosecutor has not raised the issue, we express no opinion on the question whether attempted child selling was in indictable offense at common law. Rather, we note that our reversal is without prejudice to the filing of common-law felony charges in the event it is determined that defendant's actions were indictable at common law.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Griffin, J., concurred.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin